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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1960

No. [redacted] 31

THOMAS MICHALIC, PETITIONER,

vs.

CLEVELAND TANKERS INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 28, 1960
CERTIORARI GRANTED MARCH 7, 1960

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JUNE 29, 1960

[fol. A]

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Docket No. 13,580.

THOMAS S. MICHALIC, Plaintiff-Appellant,

against

CLEVELAND TANKERS INC., Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

Appellant's Appendix

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

RELEVANT DOCKET ENTRIES

Date	*Proceedings*
7/26/56	Complaint filed.
7/26/56	Summons issued.
7/27/56	Summons served.
1/ 4/57	Answers to the complaint by the defendant filed.
1/ 7/57	Request for trial filed.
2/ 3/58	Amended answer of defendant filed.
2/24/58	Jury impaneled and sworn; trial in progress.
2/27/58	Directed verdict for defendant on first cause of action and verdict for plaintiff on second cause of action (maintenance and cure) in the amount of $2610.00, Connell, J.
2/27/58	Order dismissing the first cause of action. Further order that plaintiff recover from defendant, on the second cause of action, the sum of $2,610.00 and costs, for maintenance and cure, filed.
3/25/58	Notice of appeal by plaintiff filed.
4/25/58	Certified original pleadings mailed to the clerk for the Court of Appeals.

[fol. 2]

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed July 26, 1956

Plaintiff, by S. Eldridge Sampliner and Victor G. Hanson, his attorneys, for his complaint, alleges as follows:

For a First Cause of Action

First: That all times hereinafter mentioned, the defendant was and still is a corporation, duly licensed to do

business in the State of Ohio and having an office and principal place of business in the City of Cleveland, Ohio.

Second: Upon information and belief, that at all times mentioned herein, defendant owned and/or managed, operated and controlled a certain Merchant Marine vessel, known as the SS Orion, a vessel duly enrolled and licensed for the coasting trade, and engaged in the business of commerce and navigation on the Great Lakes and their connecting tributaries, and being a vessel of more than twenty (20) tons burden, and at all times mentioned herein, employed in the business of commerce and navigation between places in different states and territories, upon the Great Lakes and foreign countries and navigable waters connecting the Great Lakes.

Third: That during the month of December, 1955, plaintiff was in the employ of the defendant and under articles as a seaman, at the specified rate of pay of $500.00 per month base pay including overtime and found.

Fourth: That plaintiff is a seaman, and at all times hereinbefore mentioned there was, and still is in force and effect, an Act of Congress known as the Merchant Marine Act (Title 46 U. S. C. A., Chapter 18, Section 688) approved June 5th, 1920, Section 33 of which provides as follows:

> "That any seaman who shall suffer personal injuries in the course of his employment, may, at his election [fo. 3] maintain an action for damages at law, with the right of trial by Jury, and in such action all Statutes of the United States modifying or extending the common law, right or remedy in cases of personal injury to railway employees shall apply."

Fifth: Plaintiff says that sometime during the month of December, 1955, on a day certain, within the knowledge of the defendant, and while the vessel at all times mentioned herein was upon the waters of Lake Erie, berthed at her dock in the Port of Cleveland, Ohio, and while in the pursuance of his duties under peremptory orders and exercising due care and caution for his own safety, the First Assistant Engineer before noon ordered the plaintiff to assist the pumpman in the pump room, and while in the

process of taking off the nuts on the pump, while using a heavy wrench, suddenly, and unexpectedly the wrench slipped off the nut and fell several feet and violently and forcibly struck the large toe on his left foot. Plaintiff further avers that he was ordered to perform said work in close quarters, using an old defective wrench in an unseaworthy condition in that the teeth and grip of the wrench were worn and defective. Plaintiff says that as a result thereof, he sustained severe and painful injuries, necessitating an amputation of his left foot below the knee.

Sixth: That his said injuries, hereinafter stated, were not caused by any negligence, fault, or want of care on plaintiff's part, but wholly and solely by reason of the carelessness and negligence of the defendant, their servants, agents, and employees, acting within the scope of their employment,

in negligently and carelessly failing to provide plaintiff a safe place and a safe way for him to perform his work upon said vessel,

[fol. 4] in failing to warn or apprise said plaintiff when the defendant knew or in the exercise of ordinary care should have known of the conditions existing thereat and of the dangers incident thereto,

in negligently and carelessly failing and neglecting to exercise ordinary care for plaintiff's life and limb while he was employed on said vessel as a seaman,

in improperly placing the wrench on the nut, when the defendant knew or in the exercise of ordinary care should have known that the teeth of the wrench would not hold or be secure,

in negligently, knowingly, ordering, permitting and allowing plaintiff to work in the position alleged aforesaid, in close quarters, when the defendant knew, or in the exercise of ordinary care should have known of the condition of the defective teeth of the wrench,

in negligently and carelessly maintaining, equipping, and providing said vessel, with a defective wrench, all as aforesaid,

in negligently and carelessly failing to maintain, equip and provide a proper and secure wrench which

would not loosen when average pressure would be applied,

in negligently and carelessly failing and neglecting to provide adequate proper and seaworthy and reasonably safe appliances, to wit: a proper wrench without worn teeth;

in negligently and carelessly permitting, peremptorily ordering and allowing plaintiff to work thereat, as aforesaid, when the defendant knew or in the exercise of ordinary care should have known of the [fol. 5] perilous position of the plaintiff, which was open and obvious to the defendant at all times, and failed to maintain a proper lookout for the plaintiff,

in negligently and carelessly failing and neglecting to properly supervise the removal of the nuts off the pump or regulate or direct such work with due and proper precaution for the safety of this plaintiff,

in negligently and carelessly failing to replace said defective, old, and unseaworthy wrench,

in negligently failing to furnish plaintiff with an adequate number of officers and co-employees and to provide plaintiff with skillful, careful and competent co-employees, master and other officers,

in failing to promulgate and enforce proper rules in relation to the foregoing and to inspect the aforesaid materials, appliances and means.

Seventh: That as a direct and proximate result of the defendant's negligence in one or more of the aforesaid matters, the plaintiff then and there sustained severe and painful injuries, both externally and internally, and suffered a severe shock to his nervous system, and that he sustained a severe injury to his left foot, which eventually necessitated an operation, amputating his left leg below the knee. That he has been advised that there is a possibility of the necessity of a future operation, involving further amputation. That there is an involvement of the bones, muscles, tendons, ligaments and structures of the remaining portion of his left leg, and that he became and was sick and disabled, and suffered and will in the future suffer great pain and discomfort and physical impairment and embarrassment, all of which injuries are permanent, and that he has

lost and will lose great gains which he otherwise would [fol. 6] have made and acquired, and that he will suffer a loss of earnings in the future, and plaintiff may be required to incur obligations for medical and surgical aid and attendance, and nursing care, and plaintiff was otherwise injured, all to his damage in the sum of Three Hundred Fifty Thousand Dollars ($350,000.00).

For a Second Cause of Action

Eighth: Plaintiff repeats and realleges all the facts set forth in the First Cause of Action with the same force and effect, as though pleaded herein in full, omitting all allegations of negligence, unseaworthiness, pain and suffering, loss of wages, and diminution of earning capacity and any and all claims other than for amounts needed to maintain and cure himself in and about his care while disabled and unable to work, including both past maintenance and cure and maintenance and cure for a reasonable period in the future, and that defendant was under duty to further furnish said maintenance and cure, but breached the same.

Ninth: That plaintiff, as a result of the foregoing, has expended and will expend for a reasonable period of time in the future for his maintenance and cure, while disabled and unable to work, the sum of Thirty-one Hundred Dollars ($3100.00), all to his damage in the further sum of Thirty-one Hundred Dollars ($3100.00).

Wherefore, plaintiff demands trial by jury and judgment against the defendant in the sum of Three Hundred Fifty-three Thousand One Hundred Dollars ($353,100.00), together with the costs and disbursements of this action, and further prays that he be permitted to prosecute this action without advancement of or give security for costs under favor of the Statutes of the United States in such [fol. 7] cases made and provided, particularly Chapter 113, 40 Statutes, 688 U. S. Code, Title 28, Section 1916.

S. Eldridge Samplinet, Attorney for Plaintiff, 301 Caxton Bldg., 812 Huron Road, Cleveland 15, Ohio —MAin 1-4250.

Victor G. Hanson, Attorney for Plaintiff, 15921 West Seven Mile Road, Detroit, Michigan—VErmont 7-4742.

Jury Demand

Now comes the plaintiff, Thomas S. Michalic, and demands a trial by jury of the within cause, as by the statutes of the United States in such cases made and provided.

Thomas S. Michalic, By S. Eldridge Sampliner, One of his Attorneys.

[fol. 8]

In United States District Court

Excerpts From Testimony

* * * * * * *

Plaintiff's Testimony

* * * * * * *

Direct examination of Thomas Michalic.

By Mr. Sampliner:

Q. Try to keep your voice up so that all the jurors can hear you, please.
A. Yes, sir.
Q. Now, what is your full name?
A. Thomas Michalic.
Q. Do you have a middle name?
A. Thomas S. Michalic.
Q. What is your address?
A. 1931 Warren Street, Dearborn, Michigan.
Q. How long have you been sailing on the Great Lakes?
A. Oh, off and on for about four years.
Q. And have you been in the Armed Forces?
A. Yes, sir.
Q. How old are you?
A. Forty-four.
Q. You have a daughter 17 years of age?
A. Yes, sir.
Q. Now, recalling to you the SS Orion, when did you join, if you can recall, the Steamer Orion as a fireman?
A. I joined her in 1956 in October.
Q. October?

A. October.

Q. What year was that?

A. 1955.

Q. What city did you join her at?

A. Erie, Pennsylvania.

Q. Prior to that time had you worked for the Cleveland Tankers all the time?

A. Yes, sir; not all the time, no.

Q. How long had you been employed by Cleveland Tankers?

A. About three years.

Q. Did they assign you to this vessel SS Orion in October?

A. Yes, sir.

Q. What was your job?

A. My job was to be a fireman.

[fol. 9] Q. And when you were on board the SS Orion did you perform the duties of a fireman?

A. Yes, sir.

Q. Would you be kind enough to tell the Court and jury what the duties of a fireman are on board the Steamer Orion?

A. The duties of a fireman on board the Orion is to keep the steam pressure up and watch the water in the boiler.

Q. In that particular job where did you work on that vessel?

A. I worked in the firehold.

Q. In the SS Orion is the engineroom and the firehold combined?

A. Yes, sir.

Q. Now, can you tell us what portion of the vessel the engineroom and the firehold are in?

A. In the after end.

Q. Now, do you work under orders?

A. Yes, sir.

Q. Who was your superior officer?

A. My chief engineer, first assistant, second assistant, third assistant.

Q. And do you do anything except what they tell you to do, do you follow out their orders?

A. I followed orders, yes, sir.

Q. Now, as a fireman were you certified by the United States Government through the Coast Guard to perform the duties of a fireman?

A. Yes, sir.

Q. And as a member of the crew of the SS Orion?

A. Yes, sir.

Q. Now, what was your rate of pay on this vessel, if you can recall?

A. It was about $550 pay monthly.

Q. $550 was paid monthly. And did you live and sleep and eat on board the vessel?

A. Yes, sir.

Q. That was in addition to your pay?

A. Yes, sir.

Q. Now, recalling to you the month of December, 1955, where was the vessel?

A. The vessel was here in Cleveland on Whisky Island.

Q. And is that down in the Flats here in Cleveland?

A. Down in the Flats here in Cleveland, yes, sir.

Q. Can you tell us about an occurrence which happened in December, 1955?

A. In December, 1955 I was ordered to go into the pumproom to assist the pumpmen.

[fol. 10] Q. Who ordered you to go in?

A. The first assistant.

Q. Where did you receive the orders?

A. I received my orders in the firehold.

Q. Can you remember what the words were?

A. The first assistant told me, he said, "Tom you go help the pumpman in the pumproom."

Q. What time did he give you that order?

A. About 8:00 o'clock in the morning.

Q. Was the pumpman there?

A. The pumpman was in the firehold with me.

Q. Then what did you do?

A. Me and the pumpman, we walked out of the firehold and walked in the pumproom.

Q. When you say you walked out of the firehold, could you go from the engineroom and the firehold into the pumproom without going out on deck?

A. No, sir.

Q. All right, tell us what happened: did you go into the pumproom?

A. Me and the pumpman got into the pumproom, yes, sir.

Q. What did the pumpman do and what did you do, or what did he tell you?

A. Well, the pumpman told me, he said, "Tom, I want you to work on this pump here. I am going to work on that pump over there, that is, the pump on the starboard side."

Q. Now, would you go ahead and point on that drawing—does that drawing represent a true representation?

A. Yes, sir.

Q. Go ahead.

A. That's a pump right there (indicating on blackboard drawing).

Q. Now, would you be kind enough to tell us or describe that pumproom? Can you tell us the dimensions of the pumproom?

A. Well, I can't tell you how large the ship is but when I was ordered to go into the pumproom, this is the catwalk goes from one end of the ship, from the starboard to the port side. I was ordered to work on this pump here. So the pumpman told me, he said, "Here, Tom, here is a wrench." It was a big wrench, old beat-up wrench. Even [fol. 11] the pumpman himself said, "Tom, we have a bunch of bad tools."

Mr. Ray: If the Court please, I object.

The Court: Do you have a request?

Mr. Ray: I have an objection.

The Court: Based on what?

Mr. Ray: Based upon hearsay and the conclusion of the witness. He is describing what he said the pumpman said about the condition of the wrench, that it was old and beat-up.

The Court: What the pumpman said will be stricken. I think the gentleman better be seated and testify like anybody else.

Q. Now, Tom, as you got to this pump, what else did the pumpman hand you besides this wrench?

A. Well, he handed me the wrench and he handed me an old lead mallet they used in the pumproom.

Q. Can you describe this wrench?

A. It is about a foot long.

Q. Was it an adjustable end or open end wrench?

A. It was an open end wrench. It was an old wrench, all chewed up on the end.

Q. Now, did you have to get off the cat-walk?

A. Yes, sir. I had to get off that cat-walk and I had to crawl between four beams that hold the pump from vibrating, work underneath the cat-walk.

Q. Now, did the pumpman order you to do this work?

A. Yes, sir.

Q. What did he do after he ordered you to do the work?

A. After he told me what to do he walked to his pump.

Q. You say he ordered you to do the work?

A. Yes, he showed me how to remove the head bolts.

Q. How many bolts were there on this pump?

A. I figure there was about 40 bolts.

[fol. 12] Q. After he showed you did you start to work?

A. Yes, I continued on my pump.

Q. Where was he?

A. Well, the pumpman was standing on the cat-walk, looking around and he said, "Tom, I am going to leave, I am going up in the forward end to turn off a valve." The water was dripping on his pump.

Q. Which pump was he working on?

A. On the starboard side.

Q. On the port side or starboard?

A. On the port side here. I am sorry.

Q. What was the illumination at that particular time as far as the pumproom was concerned?

A. As far as that pumproom is concerned, to my estimation it was poor, very poor.

Q. Where was the light?

A. The light was way up on the side of the ship, on the top.

Q. Was it a portable light?

A. Portable light.

Q. Did they have any other electricity?

A. No, sir, they only had shore lights, that's all.

Q. As far as the illumination in that room, what other illumination was there besides the portable light?

A. Nothing; that's all we had, just the portable light.

Q. And where was it hanging?

A. The portable light was hanging over the pumpman's pump on the port side. He had a string tied to it and it was hanging right down beside his pump.

Q. Go ahead and tell us about removing the bolts and nuts.

A. Well, after the pumpman took and walked to his pump, he came back to me and told me, "Tom, I have to go to the forward end", and that left me all alone in the pump room.

Q. Did he leave?

A. I told him, I said, "This tool is not very good, kind of beat up. It's very cold down here." I said, "This wrench keeps slipping off." He said, "Never mind about that," he said, "do the job as best you can."

[fol. 13] Q. Did you do the work?

A. I did the work to the best of my ability.

Q. Now, you say he went forward?

A. He went up to the forward end, yes.

Q. What did you do?

A. I stayed in the pumproom. I did my work down there and waited till he returned

Q. While he was away did you attempt to pull that portable light over to where you were working?

A. Yes, I did. I attempted to move it over to where I was but it was too short, it wouldn't reach my pump at all.

Q. What happened after you took off the bolts and nuts?

A. After I started taking the bolts off with the old wrench, only about three or four more to get loose, a couple of them, I had hold of a nut and I had to it and I hit the wrench and it slipped off and it hit me on the foot at the big toe.

Q. Which toe?

A. On my left leg.

Q. Now, going back to the engineroom and firehold, do they have the turbines there for the steam?

A. They have the turbines for steam and they have the Diesels for power. Both Diesels were down. They were overhauling both Diesels.

Q. Now, did the pumpman come back to the pumproom at any time?

A. Yes, he came back about two hours later.

Q. Now, did you think there was anything serious when you dropped that wrench on your toe?

A. No, sir, my feet were so cold and froze, I was even standing in water down there, all my feet was froze, there was no heat, no steam of any kind down there. I had to stay down and wait for the pumpman, I couldn't leave my job down there.

Q. As you were working there you stated you had to get between four beams. Can you describe them a little bit?

A. Yes, I can. The four beams, they held the pump. When the pump is pumping out cargo in a port the four steel beams that comes around the pump keep the pump from vibrating when they are pumping out.

[fol. 14] Q. What is the distance from the top of the pump to the cat-walk where you had to go in there and work?

A. About six inches.

Q. Is that the area you had to work?

A. Yes.

Q. Was there any light provided at the cat-walk, in that area at all other than what you have described?

A. No, sir.

Q. Go ahead and tell us whether or not you continued to work after this occurrence in December?

A. Yes, I finished my job on my pump there, took all the bolts off, took off the bolts and laid them up on top of the cat-walk. I crawled out from underneath the pump, crawled up on the cat-walk and walked over to his pump and sat down and waited for the pumpman to return.

Q. Now, did you work the rest of the day?

A. Yes, sir.

Q. Did you work the next day?

A. Yes, sir.

Q. Did you place any sock on your toe of your left foot?

A. Yes, sir.

Q. Did it hurt you at any time?

A. It hurt me terrible, yes, sir.

Q. Did you continue to work at your job?

A. Yes, sir, I laid the ship up.

Q. How long did you work there?

A. I laid her up, I was the last man off the ship.

Q. When was that?

A. It was in the month of January some time.

Q. When you finished working on the Orion where did you go?

A. I went right straight back to Erie, Pennsylvania.

Q. While you were on the vessel, up to the time you left in January did you do anything relative to your toe, soak it or anything?

A. Yes, I took my leg when I went home, I soaked it in hot water, Epsom salts, stuff like that when I was home.

[fol. 15] Q. Do you recall whether or not after you got hurt you made any trips to the Marine doctor, Dr. Reister in Erie, Pennsylvania?

A. No, sir.

Q. You didn't. All right, now, did you rejoin the ship?

A. I got a letter from the Union Hall out of Detroit, Michigan, telling me to rejoin my ship, which I did.

Q. From the Union Hall?

A. From the Union Hall.

Q. You got orders to rejoin the vessel?

A. Yes, sir.

Q. When was that?

A. That was the 15th of March.

Q. Where did you rejoin the vessel?

A. In Cleveland, on Whisky Island.

Q. And you rejoined her here in March, is that right?

A. Yes, sir.

Q. During this time and after you rejoined her were you still bathing your toe?

A. Yes, sir.

Q. Now, what happened when you got back to the ship in March?

A. Well, when I got back to the ship in March I went back as a fireman, as usual, and I made a few trips on the tanker Orion. My leg was so bad, so painful, I couldn't take it no more so we pulled into Toledo, Ohio, and I told the engineer, I said, "I have to get off." I said, "I want a hospital ticket." He said, "All right." So I got off in Toledo and I went back to Erie, Pennsylvania.

Q. Before you got off did you make out any accident report from the time you joined the vessel from March 15th up to the period you got off in April?

A. No, sir.

Q. Did they make out an accident report, do you know?

A. I don't know, sir.

Mr. Sampliner: Do you want me to introduce the original accident report or want me to use a photostat?

Mr. Ray: Whatever you care to.

Mr. Sampliner: I offer in evidence Plaintiff's Exhibit 1.

Mr. Ray: No objection.

The Court: It may be received.

[fol. 16] Q. Did you tell Dwight H. King, the Master of the SS Orion, on the 1st of April, 1956, when he gave you your hospital ticket when you left the vessel about dropping a wrench on your foot?

A. Yes, sir.

Q. And did he ask you questions as to whether or not Walter Peterson of Cleveland Tankers was in charge of the work at the time it happened?

A. Yes, sir.

Mr. Ray: I object, your Honor.

The Court: The answer is in so it may remain.

Mr. Sampliner: Your Honor, can I pass this around to the jury or may I read it?

The Court: Maybe if you read it it would save time.

Mr. Sampliner: This is "Report of injury to employee or other person.

"Instructions—in event of injury, however slight, fill out this blank in detail and send at once to your employer. In case of fatal or serious injury, telephone or telegraph at once. Name of vessel—SS Orion.

In whose employ at time of accident? Cleveland Tankers, Inc.

Injured person's name—Thomas Michalic, Jr.

Address in full—951 West Sixth Street, Erie, Penna.

Married or single—Single.

Children or dependents—how many? One.

Position held—Fireman. How long employed? 8-31-55 to 4-1-56. Wages $369.26 per m.

Date of accident—12-28-55. Approx. 1955. Hour unknown. Was light good?—Yes.

Port or location of vessel when accident occurred—Cleveland, Ohio.

Exact location on boat or dock where accident occurred.—Pumproom while ship was laying up at Allied Oil dock on Whisky Island.

[fol. 17] State fully how the accident happened, its causes, etc., illustrating, if possible, by a rough sketch.

While working with pumpman in pumproom man said he dropped a wrench on his foot and his toe has been sore ever since.

Was machinery, tools, staging, ladder, etc., connected with the accident sound and in good working order?—Yes.

Name and extent of injuries?—Foot infection in big toe on left foot.

Where taken after the accident?—No apparent injury so man stayed on vessel.

Did injured person remain aboard ship?—Yes.

Attending doctor's name and address.—U. S. Marine Hospital, Detroit, Michigan.

Probable period of disablement.—Unknown.

If to hospital, which one?—Above.

Has injured done similar work prior to this employment?—Yes.

What instructions had been given the injured person?—Advised to go to hospital by ship's officer.

By whom?—Richard Hostetter, 1st Assistant Engineer.

Name and address of foreman in charge of work?—Walter Peterson, Cleveland Tankers, Cleveland, Ohio.

Where was he at the time, and what was he doing?—Unknown.

Was accident due to want of ordinary care on part of injured person, if so, how?—Unknown.

Was he sober?—Unknown.

Was accident due to negligence of any other person, if so, how and of whom?—No.

Give statement made by injured person as to cause of accident and names and addresses of those who heard it.

[fol. 18] Man stated that he dropped wrench on foot in pumproom while helping pumpman. As of 4-1-56 the pumpman does not recall any such accident.

Names and addresses of all witnesses important.—None.
Dated at Toledo, Ohio, on the 1st day of April, 1956.
Notice made out by Dwight H. King.
Whose position in our employ is Master SS Orion."

The Court: Don't take time to pass it around. You have read it and it will go to them as an exhibit later.

Q. Now, Tom, when you got off the vessel around April 1st, where did you go?

A. I went back to Erie, Pennsylvania where I was staying, living.

Q. What did you do?

A. When I went home a few days I called up Dr. Reister, the Marine doctor, and I told him about my troubles, so he said, "Well, Tom, soak it in some hot water and Epsom salts for a few days." I did that. No relief. So I made a trip to Dr. Reister. He examined my toe. He said, "Well, Tom, you have a bad leg, the toe has a little infection." So he said, "Maybe a shot of penicillin will clear it up." So he gave me a shot of penicillin. A couple of days later I made another trip to Dr. Reister and he gave me another shot of penicillin. I went to Dr. Reister three or four times. The last time he said, "Tom, that foot looks very bad. I advise you to go to the Marine Hospital, Detroit, Michigan." So I left that night for Detroit. I arrived at Detroit, Michigan, 7:00 o'clock the following morning.

Q. What did you do when you arrived there?

A. When I arrived in Detroit the following morning I was admitted to the hospital at 10:00 o'clock and I was put to bed. Dr. Brumbach examined by leg. He said, "Well, [fol. 19] Tom, we are going to put your leg in a heat tent." So they put my leg in the heat for about a week and no results. So the following Saturday morning he and Dr. Valle comes in and they said, "Well, Tom, that toe doesn't look too good. I think we will have to take the toe nail off." The following morning they took the toe nail off, they operated.

Q. Go ahead, tell us what happened?

A. After they took the toe nail off, it was about a week later they come around—they make the rounds every Saturday—it started to get pretty black, so they turned away and said, "Tom, it looks like you are going to lose your big toe". The following Monday morning they took me to

surgery and cut the big toe off. They took me back to my room, put me to bed, and a week later the leg was black and blue and necrotic, and they waited a couple of more days and said, "Tom, we are going to have to cut your leg off about here, just above the ankle." That following Monday they cut the leg off there above the ankle. They wanted a few days and still there was drainage, a lot of drainage coming out, and the following Saturday Dr. Valle looked at it and Dr. Brumbach and he said, "Tom, that leg doesn't look too good. We are going to have to cut some more." So they cut again, just below the knee this time, like, took it off like that (indicating). So when they cut it off here it did look pretty good but it still started draining, a lot of drainage, still gangrenous, so Dr. Valle said, "Well, we will give it a week." They gave it a week and the following Saturday he comes around again and said, "Well, Tom, we have to take your leg off above the knee." The following Monday they cut it off above the knee. That was the end of my amputations.

• • • • • • •

Q. When did you find out you had Buerger's Disease?

A. I found out I had Buerger's Disease in 1952 when I was sailing for the Pittsburgh Steamship Company.

[fol. 20] Q. Tell us about that, how did you happen to find out about that?

A. Well, I developed a pain in the calf of my leg and my walking, I couldn't walk too far. If I walked about a half a block I would have to stop. I couldn't walk the whole length of the deck of the ship. So I got off the ship and I got a hospital ticket and went to Detroit Marine Hospital and I was operated.

Q. So we understand, the United States Public Health Service Hospitals, which you call Marine Hospitals, they are free of charge to the seamen, aren't they?

A. Yes.

Q. All you need is a hospital ticket from the ship to gain admittance?

A. Yes, sir.

Q. Then you were telling us you went to Detroit. What happened while in Detroit Marine Hospital in 1952?

A. Well, they gave me a little Buerger's Disease trim, there, which didn't help me out at all. They did a blocking in my back, stuck about twenty needles down my back and cut me here on the side, cut a nerve in my back, which relieved the pain in my leg.

Q. What kind of discharge did they give you after they released you from the hospital?

A. I got a discharge, recommended for duty.

Q. Were you declared fit for duty?

A. Fit for duty, yes, sir.

Q. Were you allowed any days of convalescence before going back to duty?

A. I had fourteen days.

Q. After your fourteen days did you go back into the service of any ship?

A. Yes, sir, I went back to the Cleveland Tankers.

Q. You said when you discovered this condition you were with the Pittsburgh Steamship Company on a lake vessel. Did that mean when you were returned as fit for duty you could go from ship to ship?

A. From ship to ship.

[fol. 21] Q. You went back; in other words, previous to the time you were on the Pittsburgh ship you had worked for the Cleveland Tankers?

A. Well, I worked for the Pittsburgh Steamship Company first, then I went in 1952, after I came out of the Marine Hospital, after surgery and I had the fourteen days, I went back on the tanker Meteor.

Q. Does that belong to the Cleveland Tankers?

A. It belongs to the Cleveland Tankers.

Q. Then what happened?

A. I sailed on her for almost two years.

* * * * * * *

Q. Now, Mr. Tom Michalic, in addition to the accident report made out by the Captain, did you yourself report the accident to any other members of the crew?

A. Yes, sir.

Q. Do you remember any one of them?

A. I told the oiler-fireman and a couple of forward engine crew working at the after end.

Q. Did you tell any of the officers?

A. I told the Third Mate at that time.

Q. Who was the Third Mate?

A. His name, last name I don't remember. Harold is all I know him by. He is the mate from Toledo.

Q. Can you tell us your present physical condition?

A. It is good.

Q. Tell us about your ability to get about with your prothesis?

A. I get along fairly good.

Q. What was the condition of your health and physical being previous to the time in December 1955 that you had your injury?

A. Good.

Q. Were you able to work before the accident?

A. Yes, sir.

. . . . . .

[fol. 22] Cross examination of Thomas S. Michalic.

By Mr. Ray:

Q. Mr. Michalic, did you report that you had dropped a wrench on your foot to the pumpman?

A. No, sir.

Q. How soon after you dropped this wrench on your foot did he come back into the pumproom?

A. Oh, he was gone a couple of hours. He come in there about 11:00 o'clock, just before lunch time.

Q. He was the first man you saw after the accident?

A. Yes, sir.

Q. You say you reported the accident to the Third Mate. That date was in April?

A. Yes.

Q. You didn't report it to any officer at the time in December, did you?

A. In December, no, sir.

Q. So that this accident that occurred to you on the 28th of December was not reported to a single individual on that vessel?

A. Yes, I told a couple of deck hands but no officer?

Q. Not the pumpman?

A. Not the pumpman.

Q. Now, let's go back to 1951. In 1951 you sailed on the Steamer William Irwin for the Pittsburgh Steamship Company, didn't you?

A. Yes, sir.

Q. While you were on that vessel you dropped a sack of cement on your foot, didn't you?

A. Yes, sir.

Q. And as a result of dropping that bag of cement on your foot your foot was injured, wasn't it?

A. Yes, sir.

Q. Were you hospitalized as the result of that injury?

A. I went to the Marine Hospital, yes, sir.

Q. So as early as 1951 you were aware you had some difficulty with the circulation in your legs, isn't that a fact?

A. No, sir.

Q. What kind of treatment did they give you in Marine Hospital for that injury?

A. They put my leg in a tent; that's all.

[fol. 23] Q. Were you told what type of disease you had?

A. Not until '52.

Q. 1952?

A. Yes, sir.

Q. Now, at the time the diagnosis of Buerger's Disease was made were you told what type of disease that is?

A. Dr. Brumbach told me he diagnosed it as Buerger's Disease.

Q. Did he tell you what Buerger's Disease is?

A. Yes.

Q. So that from 1952 you were aware, were you not, that you had a circulatory trouble of a very serious nature in both your legs?

A. Not both my legs, just the one leg.

Q. That's the leg involved right on this report, your left leg?

A. Yes, sir.

Q. Now, which officers, if any, of the Orion did you tell you had Buerger's Disease?

A. Well, I told this here Howard Isenbach, the Third Mate, at that time.

Q. At what time?

A. In April, when I got off the ship.

Q. That is, April of '56?

A. Yes, sir.

Q. Did you tell anyone else?

A. I told a couple of deck hands working in the after end, helping lay up the ship. I told the fireman.

Q. Prior to that you hadn't told anyone on the vessel you had had Buerger's Disease, is that correct?

A. Yes, sir.

Q. In the pumproom of the Orion there are three pumps, are there not?

A. Well, sir, I don't know. I just know of two.

Q. One on the port side and one on the starboard side and one about amidships?

A. That's the one I was working on, midship—the two pumps I know.

Q. The one amidships?

A. That one right there (indicating on drawing).

Q. I thought on direct examination you pointed out the pump on the starboard side.

A. That's the one I was working on, yes. I was working on this pump right here.

Q. Is there one on the port side also?

A. No, sir, I don't think there was. Not that I recall.

[fol. 24] Q. How high was this casing you were working on above the deck of the pumproom?

A. You mean the cat-walk?

Q. I am talking about the casing. How far above the deck was the casing?

A. It was a good two or three feet.

Q. Above the casing we are talking about there was a cargo pipe, wasn't there, that is used to discharge the cargo from the vessel?

A. Yes, sir.

Q. That is about two and a half feet above the casing we are talking about, the casing being the one you were working on?

A. Are you talking about the pump, the pump head? I don't call it a casing.

Q. The pump head?

A. That's right.

Q. There was a cargo discharge pipe about two and a half feet above that pump?

A. Yes, sir.

Q. Was there any cat-walk in the area of that pump you talked about?

A. Yes, sir.

Q. Where was that located?

A. It goes across the ship.

Q. But is it right over the casing or to the side?

A. Half way over. It is half way over the casing.

Q. Now, when you were taking the bolts and nuts off, how many of those nuts had you taken off at the time the wrench slipped?

A. I had them all off but about five or six.

Q. You took those off without difficulty?

A. I had a hard time loosening them off.

Q. But you got them off?

A. Yes.

Q. In other words, you put the wrench on there and tapped it with the mallet and loosened them and then you turned the nuts off?

A. I had a hard time taking them off.

Q. But you took them off?

A. Yes, the pumpman told me, "Do the best you can".

Q. You got them off and you got all but how many off at the time the accident occurred?

A. About five.

Q. And you were using the same wrench?

A. The same wrench.

Q. And the same mallet?

A. Same mallet all the way through.

[fol. 25] Q. Did you have gloves on when you were doing this?

A. No, sir. The fireman never works with gloves on.

Q. Are there portholes in that pumproom?

A. Yes, I think there is four.

Q. And this accident happened in the daytime, didn't it?

A. It happened in the morning, about 9:00 o'clock.

Q. What is the size of those portholes?

A. About six inches in diameter.

Q. Six, you say?

A. I would say about six inches.

Q. That is your best recollection how large those portholes are, is that correct?

A. Yes, sir.

Q. Now, where did this portable light you are talking about, where did it lead from?

A. It must have been coming out of the firehold.

Q. It was hanging on this pipe?

A. It was hanging over the pipe, down over the top of his pump.

Q. Of his pump?

A. Of his pump.

Q. You had nothing by you at that time?

A. No, sir, I never had nothing by my pump.

Q. You didn't bother to move that?

A. I tried to move his portable light, but it wouldn't reach.

Q. Did you try to relocate that light?

A. No, sir.

Q. You went over and tried to move it and because it did not move you went back about your business?

A. Went back to work.

Q. And you got all but five of the nuts off and then the wrench slipped, is that true?

A. Yes, sir.

Q. Are you familiar enough with the working of that vessel to know how often those casings are taken off?

A. No, sir, that's the first time I worked in that pumproom.

Q. You worked for about three years, you say, on Cleveland Tankers boats?

A. Yes, sir.

Q. You know as a fact that pump that is only taken off and put on twice a year; isn't that a fact?

A. I don't know. That's the first time I worked in the pumproom. I was a fireman.

[fol. 26] Q. The vessel is quite a small entity; you ar around the pumproom?

A. No, sir, I don't go around the pumproom. I am a fireman and I come in the firehold and that's all.

Q. Would you say, if I told you it is only removed twice a year, would you think that would be pretty accurate?

A. I couldn't say.

Q. You don't know enough about it?

A. I don't know a thing about the pumproom. I was ordered by the first assistant to go in the pumproom and help the pumpman.

Q. Where did you get the wrench that you used?

A. Mr. Hanson, the pumpman, gave it to me.

Q. Did he give it to you the minute you went into the pumproom?

A. Yes, sir.

Q. Did he get it from any tool box?

A. No, sir, I don't know.

Q. You don't know where he got it?

A. He had it.

Q. You didn't see any tool box in the pumproom?

A. I think he had a tool box setting on top just as you come into the pumproom.

Q. Did you become aware that this wrench, as you have described, was getting worn as you were taking those nuts off?

A. I told him about it, yes, sir.

Q. Did you go out and try to get another wrench out of the box?

A. No, sir, he told me, "You do the best you can with that wrench right there".

Q. He told you not to use another wrench?

A. He said, "You do the best you can with that wrench right there".

Q. That's the only wrench you could use?

A. The only wrench I had to use.

Q. Were you aware there were Stilson wrenches in that box?

A. Which box?

Q. The tool box.

A. There were no Stilson wrenches. I didn't see any.

[fol. 27] Q. Then you went up to the box to look?

A. I didn't look in the box.

Q. Well, how do you know?

A. Because I seen the tool box when I was coming into the pumproom that morning.

Q. Did you look at it?

A. No, I didn't look in nothing.

Q. You can't tell the Court and jury what type of wrenches were in that tool box?

A. No, sir, I could not.

Q. Now, in the light of the experience you had had as far back as 1951 and then in 1952 you were pretty much aware when your toe became damaged it was a rather serious thing, weren't you?

A. Well, when I had that operation done in 1952 in the Marine Hospital at Detroit, Michigan, why, my leg improved a hundred percent. I was discharged. I had fourteen days' rest. I never had any trouble with my foot at all.

The Court: I don't think that is an answer to the question. Would the reporter read the question?

(Question read.)

A. Yes, sir.

Q. Well, in the light of that knowledge, Mr. Michalic, what would you do take care of your toe after this wrench dropped on it?

A. Well, I went up into my quarters and I took a hot bath, and when I got through with the hot bath I had a bucket and with some Epsom salts the steward gave me I soaked my foot in Epsom salts.

Q. You knew you had a great deal more than a sore foot, in the light of your previous experience?

A. I didn't think I was hurt too bad.

Q. How soon after this accident did your toe nail become festered?

A. Oh, about a week after that.

Q. That didn't make you concerned, is that right?

A. No, sir, I thought it would clear up.

* * * * * * *

Q. Now, will you describe with as much particularity as you can just how the wrench slipped off the nut?

A. Like I say, I had the wrench in my hand.

[fol. 28] Q. You were standing next to the pump?

A. I was standing. I got hold over here, and I hit it with the mallet and it slipped off the nut and came down the side of the pump and hit my big toe.

Q. You hit the handle of the wrench with the mallet?

A. Yes, she slipped off the nut on the pump and came down the side of the pump and smashed my big toe.

Q. That's exactly the way you did it on all the others?

A. I had to use the mallet on all the nuts, that's right; they were pretty tight.

Q. In other words, you had gone through the same maneuver on the others as you had with this?

A. Yes, sir.

Q. Did you have any difficulty putting the wrench on the nuts before hitting it with the mallet?

A. Yes, sir, they slipped.

Q. What slipped?

A. The wrench did.

Q. As you were putting the bolts on?

A. I wasn't putting the bolts on.

Q. I am talking about putting the wrench on the nuts. Did you have any difficulty putting the wrench on the nut you took off?

A. I told you the wrench was slipping off the nuts; it slipped off every one of them.

Q. You had no difficulty seeing the bolts, did you?

A. No, sir.

Mr. Ray: That's all.

Redirect examination of Thomas S. Michalic.

By Mr. Sampliner:

Q. On these portholes Mr. Ray asked you about, can you tell us where those portholes were located, if you can recall?

A. Yes, sir. Here is the pumproom, right here, that's the width of the pumproom. This is the firehold, back here, and there is your portholes—one here, one here, one here—I can't recall if three or four, but I will say there is four.

[fol. 29] Q. Those portholes or port lights were between the engineroom and the pumproom, they weren't at the skin side of the ship at all, were they?

A. No, sir.

Q. Now did those portholes add any illumination to the place?

A. Those portholes were all dirty and greasy from grease flying around the pumproom.

Q. When you say "portholes" do you mean the "port light" with a pane of glass on the porthole?

A. A pane of glass in the porthole. We call them a dead-light, if you want to call it a dead-light.

Q. Is that the nautical phrase, dead-light?

A. Dead-light.

Q. Now, on the Orion, when did you first join the Steamer Orion?

A. I joined her in October of '56.

Q. '55?

A. '55.

Q. Was that the first time you ever sailed on the Orion?

A. Yes, sir.

Q. How many other ships of the Cleveland Tankers were you on?

A. I have been on one more, that was the Tanker Meteor.

Q. Just the Meteor and the Orion for the three years you worked for the Tankers?

A. Yes, sir.

Q. When you were on the Orion, when you first came on duty and worked there, did you ever have occasion to tell any members of the crew of the Orion or the officers you had Buerger's Disease?

A. Well, they knew I had Buerger's Disease.

Mr. Ray: I object.

The Court: Sustained.

Q. Who did you tell?

A. I told Dick Hostetter, the first assistant. I told the third assistant. I told the mate.

Q. You kept right on working?

A. I kept right on working, yes, sir.

[fol. 30] Q. How many members of the crew were there on the Steamer Orion?

A. Well right offhand, I think it is 31 men to the crew.

Q. And in October and November when you were sailing, and in December did the ship operate around the clock seven days a week?

A. Yes, sir.

Q. Did you stand watches?

. . . . . .

The Court: I have two questions before he leaves the stand.

You said you got all the nuts off you were to get off except five or six. How many did you take off?

The Witness: I took off about twenty.

The Court: How many?

The Witness: Twenty-five.

The Court: Twenty-five?

The Witness: Yes, sir.

The Court: You said your toe nail was black when the wrench hit it. How long had the toe nail been black before the wrench hit it in the first place?

The Witness: The toe nail wasn't black until the wrench hit it.

. . . . . .

Direct examination of JOHN LOUIS HATT.

By Mr. Sampliner:

Q. What is your full name, please?

A. John Louis Hatt.

Q. Where do you live?

A. 48 Henry Street, Detroit.

Q. How old are you?

A. Sixty-three, at present. I will be 64 on the 25th of March.

Q. How many years have you sailed the Great Lakes?

A. Since 1910.

Q. Have you sailed steady?

A. Pretty much so.

[fol. 31] Q. And you have made sailing your trade, haven't you?

A. That's right.

Q. Now, what certificates are you documented with by the United States Coast Guard, United States Government?

A. Fireman, oiler, water tender.

Q. Do you also hold a lifeboat ticket?

A. Yes, sir.

Q. Recalling to you the vessel, the Steamer Orion, have you ever sailed on the Orion?

A. Yes, sir.

Q. And how long were you on the Steamer Orion?

A. Well, I should judge six months or better.

Q. What were you on the Orion, what job did you have?

A. Fireman.

Q. A fireman?

A. Yes, sir.

Q. Do you know Thomas Michalic?

A. I do.

Q. Was he your roommate?

A. He was.

Q. Recalling to you the latter part of 1955 and the beginning of 1956 was Michalic your roommate on board the Steamer Orion?

A. He was.

Q. Do you of your own knowledge know whether or not Michalic worked with the pumpman?

A. He did.

Mr. Ray: At what time?

Q. When did he work with the pumpman?

A. Well, he worked with the pumpman laying-up and fitting-out.

Mr. Ray: I object unless it relates to this 28th of December, 1955.

The Witness: How is that?

Mr. Ray: I say I object unless what you are talking about relates to December 28, 1955. Did you see him work with the pumpman on December 28, 1955?

Q. Do you understand the question, Mr. Hatt? He wants to know whether or not on the 28th day of December, 1955 [fol. 32] were you in the engineroom in the firehold?

A. I was in the firehold.

Q. Do you know as of that date whether he was helping the pumpman, do you recall?

A. He was working with the pumpman at that time.

Q. Now, Mr. Hatt, I want to know whether or not as his roommate did you have any opportunity to observe whether or not he bathed his left foot during the latter part of December, after December 28, 1955, did you ever observe him bathing his left foot?

A. Yes, sir.

Q. Can you tell us about it?

A. He used to come down there and stay in the room and bathe his foot in a bowl of water.

Q. You saw him?

A. I seen him.

Q. Did this man ever work with you in the firehold?

A. He was in the firehold, he was a fireman.

Q. Did you observe him working in the firehold?

A. Yes.

Q. Was he able to work?

A. He certainly was. He always did his work, left his boilers in good shape. I never seen him lagging on any of his work.

Q. Did you ever observe Michalic limping after December 28, 1955, did you ever see him limping?

A. Yes, he was limping around there before.

Mr. Sampliner: You may inquire.

Q. What did you say?

A. I said before.

Q. Before what?

Mr. Ray: I object to any further volunteering. He has answered the question.

I have no cross-examination.

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[fol. 33] Direct examination of EDSEL WAISHKEY.

Q. Now, sir, recalling to you the Steamer Orion did you ever sail on the Steamer Orion?

A. Yes, sir.

Q. And how long did you put in on the Orion?

A. I was on there May and June of 1955 and January of 1956, and from March of '56 to May of '56—nine months, approximately nine months.

Q. Do you know a seaman or work with a seaman by the name of Thomas Michalic on Board that steamer?

A. Yes, sir.

Q. Do you know of your own knowledge whether or not Michalic worked with the pumpman in December or January?

A. Yes, sir.

Q. How do you know that?

A. Because at that time I was working in the engineroom myself and I seen Mr. Michalic working with the pumpman, observed him.

Q. And what is the pumpman's name, do you know his name?

A. Hans Hanson.

Q. Did you have an opportunity to ever be in the pumproom?

A. Yes, sir.

Q. Can you tell us the occasions that you were in the pumproom, if you can recall?

A. Yes, we were filling the seacocks with the seacock filler.

Q. What is a seacock?

A. That's where you let your ballast water in or out for your tanks.

Q. Were the seacocks located in the pumproom?

A. Yes, sir.

* * * * * * *

Q. Now, towards the end of December did you have an occasion, that is of 1955, to work in the pumproom?

A. Yes.

Q. Can you tell us the conditions there?

A. Well, the pumproom wasn't too large, it wasn't a large pumproom, and the lighting wasn't too good. In fact we had to use an extension cord, and then we were taking out these feed pumps, all these cargo pumps.

[fol. 34] Q. Now, did you have an occasion after the 28th day of December, 1955 to observe Mr. Michalic as to whether or not he limped?

A. Yes, we were in watching the TV in the evening and I noticed him limping, and then I asked him—

The Court: Wait a minute. Conversation is out. Haven't you told this man that?

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Q. Did you have an opportunity to observe him at work?
A. Yes.
Q. Did he work?
A. Oh, yes, he was a steady man.

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The Court: Were you on board the vessel in the Spring of 1956?
The Witness: Yes, sir.

Q. Did you have occasion to observe whether or not in the Spring of 1956 this man limped?
A. Yes.
Q. Did he limp?
A. Yes, sir.

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Direct examination of IRENE H. POWELL.

By Mr. Sampliner:

Q. What is your full name, please?
A. Irene H. Powell.
Q. Where do you live?
A. 951 West Sixth Street, Erie, Pennsylvania.
Q. For whom do you work?
A. General Electric Company.
Q. Is that General Electric in Erie, Pennsylvania?
A. That is in Erie, Pennsylvania.
Q. Do you know Thomas Michalic?
A. Yes, I do.
Q. Did Thomas Michalic live and board at your mother's and your home in Erie, Pennsylvania?
A. He did.
Q. And how long?
A. Oh, I would say off and on about two and a half years.
[fol. 35] Q. Now, recalling to you the month of January, 1956 at your home in Erie, Pennsylvania, do you recall whether Thomas Michalic returned to Erie, Pennsylvania during January of 1956?

A. Yes, he did.

Q. What did you observe about him?

A. Well, he had a limp then.

Q. Now, before he returned in January what did you observe about him before he came back?

Mr. Ray: I object unless the time is fixed.

Mr. Sampliner: All right.

Q. Recalling to you the month of September, 1955 and the early part of October, 1955, did you observe him before he went on board the vessel?

A. Oh, yes, I did.

Q. What did you observe about him?

A. He was all right then, he didn't have a limp or anything.

Mr. Ray: I object to all except the "he didn't have a limp".

The Court: Everything else goes out.

Q. Now, from January, 1956 to on or about March 15, 1956, prior to the time when he went back to the vessel did you have an occasion to observe him at your home?

A. Yes, I did.

Q. What did you observe about him during this period?

A. Well, he soaked his foot quite a bit.

Q. Did you have any particular place in the house where he would sit and soak his foot?

A. Well, he used it quite a bit in the living room so he could watch TV, try and get his mind off his pain.

Q. How many times did you observe him during that period soaking his foot?

A. Practically every day.

Q. Do you know of your own knowledge whether he went sailing during the Spring of 1956?

A. Yes, he did.

Q. How long was he gone? A. Only about just a couple of weeks.

[fol. 36] Q. After that did he return to your mother's and your home?

A. Yes.

Q. What did you then observe about him when he came back?

A. Why, his limp was bad by then and he had to use a cane.

Q. Did he soak his foot too when he came back?

A. Yes, he did.

Q. Do you know of your own knowledge whether or not he got any medical care after he came home, after April 1st?

A. Yes, in fact I went to the doctor with him, to Dr. Reister, and on two other occasions I called a cab for him to go down.

Q. Why did you take him to Dr. Reister?

A. Why, on account of his bleeding of the toe.

Q. Was there any condition in Erie at that particular time why you accompanied him?

A. Why, he was walking with his cane and he couldn't put his shoe on, the sidewalk was so icy, he asked me to go along with him to sort of help him, so I did.

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Direct examination of HAROLD F. ISENBACH.

By Mr. Sampliner:

Q. What is your full name?

A. Harold F. Isenbach.

Q. Where do you live?

A. 5309 Edgewater Drive, Toledo.

Q. How old are you?

A. Thirty-nine.

Q. How many years have you sailed?

A. Nineteen.

Q. Where have you done all your sailing?

A. Majority of it on the Lakes.

Q. Now, in what capacity do you sail?

A. Well, in the past season I was First Mate and Captain on the Orion, in the entire '57s. In 1956 I was also Master and First Mate.

[fol. 37] Q. That is the Steamer Orion, the vessel in question?

A. Yes, sir.

Q. Now, you hold a certificate by the Government as Master or Captain, do you not?

A. Yes, sir.

Q. First of all, how long have you been in this service with the defendant, the Cleveland Tankers, Inc.?

A. Eight years.

Q. How many of those eight years were you on the Steamer Orion?

A. Five seasons.

Q. That would be five years?

A. Yes, sir, approximately that, within a couple of months.

Q. The Steamer Orion, when it navigates and is in port, about how many months do you work out of a year, approximately?

A. Approximately nine months.

Q. Now, as a Master of the vessel, what are the duties of a Master?

A. The Master is the agent of the company, in complete charge of the vessel.

Q. Now, how many issues did you have of your ticket, tell us about that.

A. Well, there is two issues of the Master's license and five licenses all together.

Q. When you say, two issues, how many years is there between the issues?

A. Five years each issue. I just had it renewed a week or so ago.

Q. And the other four, what do you mean by that?

A. Well, every time you renew your license you raise your grade, you get a different issue to practice.

Q. You have your license?

A. Yes, sir, renewed in February or January.

Q. Now, Captain Isenbach, you were a Master of steam and motor vessels of what tonnage?

A. Any tonnage.

Q. And what waters?

A. Great Lakes.

Q. And what kind of a Pilot's license do you have?

Mr. Ray: I object to this kind of testimony unless he intends to qualify this man as an expert.

The Court: Sustained.

[fol. 38] Mr. Sampliner: I might qualify him as an expert.

The Court: I said sustained. He is a Captain. That's all the jury has to know.

Q. Now, in what other capacity have you served on board the SS Orion?

A. Well, at various times over this five-year period I was First, Second and Third Officer.

Q. What are the duties of the First Mate?

A. Well, the First Mate is in general charge of the work on the ship, more or less an overseer of the whole vessel, along with the Captain, under the direction and supervision of the Captain.

Q. Captain Isenbach, referring to the pumproom on the SS Orion, under whose jurisdiction is the pumpman, can you tell us something about that?

A. Well, the pumpman is connected with the engine department, but working directly under the supervision of the Mate, as far as instructions and duties to be done.

Q. Can you tell us whether or not you have knowledge of the pumproom on the Steamer Orion?

A. Oh, yes, sir, I broke in many pumpmen.

Q. Captain, what are the duties of the Second Mate?

A. Well on these tankers, most of the Mates' duties are approximately the same as far as navigation, piloting of the ship, unloading the cargo. I suppose the First Mate has charge of laying-up and the maintenance of the ship.

Q. What type of vessel is the Steamer Orion?

A. It is a steam tanker.

Q. Now, recalling to you the month of December, 1955, were you on board?

A. Yes, sir.

Q. And in what capacity at that time?

A. Second Officer, Second Mate.

Q. Captain would you be able to make a sketch on the blackboard of the pumproom?

A. Yes, sir, I think I could. (Witness goes to blackboard.) [fol. 39] I can demonstrate where the location of the pumproom is. Well, first, I will start with a picture looking aft. As you come forward there are gratings, about three feet off the bottom. This is one grating, then on the after side

there was a ladder going up, and another upper grating. Then from there on there was another ladder that went on out to the main deck, this being the main deck.

Then we had these two main cargo pumps which were located in this location. Then on the forward side here there was a couple of other pumps. Then there were various pipes in between the pumps, and so forth.

Here is a side view of it, this being the pump you have reference to in this case. Then there was a cat-walk along through the middle, approximately two and a half or three feet wide, and on each side forward there was a pump.

The upper grating was about this level, and then this ladder ahead down here from the upper grating to reach this lower level. Then the other ladder was up here.

Would it be necessary to have a rear view?

Q. No, I believe that is sufficient. Could you stand back and point to it and explain to the jury, because you were facing the blackboard?

A. This is a view looking from forward to aft of this diagram.

Q. When you say forward to aft, you mean from the front of the vessel to the end of the vessel?

A. Yes. These are gratings. Here is a cat-walk across the ship. Here are the pumps, and the ladders out of the pumproom.

Q. When you refer to the other diagram would that be called athwartships?

A. Yes, athwartships, a side view. Coming in from the after end of the ship the ladder went down to this grating. This grating went all across the ship athwartships. Then the ladder went on down to this other grating.

Maybe a top view would help.

Q. Go ahead, draw it.

A. This is an open top grating on the top of the upper grating. That is much wider. This ladder came in five to [fol. 40] six feet. There is a ladder went on down to the bottom of the pumproom at the lower grating, which would be below this, and that is narrower.

Q. Can you tell us the dimensions of the pumproom?

A. Well, it was approximately 40 feet in width or beam.

Q. That means from what side of the ship to what side of the ship?

A. From here to here, from this distance here would be, looking at it athwartships, oh, around possibly 16 feet. It is a very peculiar structure. It has sort of tapering sides.

Q. During the month of December, 1955 did you have occasion to go into the pumproom?

A. Yes, sir, I did.

Q. Did you go in there very frequently?

A. Yes, quite often.

Mr. Ray: I object to testimony along this line unless Captain Isenbach was on the vessel on December 28, 1955.

The Court: Well, that might be brought out if he was or not. It has not been shown.

Mr. Sampliner: I will. May I have the exhibit of the accident report?

Q. Captain, referring to Exhibit 1, I am going to ask you whether or not you wrote that accident report up?

A. Yes, sir, I did.

Q. And who was with you at the time when you wrote that up?

A. The Master of the Orion, DeWitt King.

Q. How did you arrive at the date of December 28, 1955?

A. Well, it was merely an arbitrary date. It was kind of hard to reckon back at the time this was made up. This was made up on the 1st of April following. This may have been any time in December. It may have been the 21st, it may have been any time during that period.

Q. Did the Captain and you figure that out at that time?

A. Yes, sir.

[fol. 41] Q. Did you type that accident report up?

A. Yes, sir, I typed that accident report.

Q. Now, going to the question again, during the month of September, 1955 were you on board the Steamer Orion?

A. Yes, sir.

Q. Did you have occasion to go into this pumproom?

A. Yes, sir.

Mr. Ray: Same objection, unless he was on the vessel Orion at the time that it is claimed in this lawsuit this accident occurred. The date of December 28, 1955 is the date that the plaintiff himself gave, and it is only the physi-

cal situation that obtained on that date that is important at all in this lawsuit.

The Court: That is the date plaintiff gave. Were you on the vessel on that day, December 28?

The Witness: Not to my recollection, sir, but when we typed this up Mr. Michalic, the plaintiff, gave me that as the approximate date. He didn't really know exactly when it would have been.

The Court: You never knew until April that he made the claim.

The Witness: Yes, sir. Those are things that are usually made out at the time of the accident, but upon returning to the vessel it was my duty to make it out.

The Court: The date given here by the plaintiff himself is December 28 of that year.

The Witness: Yes, sir.

The Court: Now, do you know whether or not you were on the boat at that time?

The Witness: No, sir, I don't believe I would have been there on the boat at that time.

Q. Now, Captain, did you issue the hospital ticket to this man?

A. Yes, sir.

Q. Now, when the vessel would get into port, for instance down here at Whisky Island, where would they get [fol. 42] their lighting?

A. Well, they had an auxiliary direct current generator down there on the dock, they would run to operate, hook it up to the ship's power.

Q. Now, do you remember in December when the vessel came in to Whisky Island?

A. Yes, sir.

Q. About when?

A. It was around the 20th.

Q. Were you on the vessel after that date?

A. Yes, sir, the following day, I am quite certain, the 21st or 22nd.

Q. Now, when the Captain and you wrote up this accident report was Michalic present with you?

A. Yes, sir, as far as I can remember on that I would say Michalic was there.

Q. And the Captain was there and you were the First Officer?

A. Yes.

Q. You typed that report up, which is Exhibit 1?

A. Yes, sir.

Q. Now, did you have any opportunity when the vessel came into port and during the month of December, around this date, the latter part of December, to inspect the pumproom or not?

A. Yes, sir.

Q. And why did you check it, do you remember?

A. Well, when you are coming into the mooring dock of that nature to prepare the ship for Spring navigation, why, you always gas-free the tanker, and I can well believe I was down there in the pumproom to see that it was gas-free at the time.

Q. Would you describe the conditions of your inspection?

The Court: As of what time?

Mr. Sampliner: The latter part of December when he was there.

Mr. Ray: I believe we are entitled to have the date fixed when this inspection was made.

The Court: You talk about gas-free. What do you mean, better tell the jury.

[fol. 43] The Witness: Gas-free is to render the ship non-explosive from gasoline.

The Court: Is that the only purpose for which you went down there?

The Witness: Possibly at that time, yes, sir.

The Court: Are you sure you went down?

The Witness: Oh, I undoubtedly would have gone down, absolutely.

The Court: Did you make any examination of any of the machines?

The Witness: Probably not at that time, but I had.

The Court: Did you have any reason to examine the machines or pump or anything else?

The Witness: No, not at that time.

The Court: Just checking for gas by your sense of smell?

The Witness: Yes, sir. Of course the chemist would come around and determine that afterwards, see if the ship was fit to do any work on it.

The Court: Go ahead.

Q. Now, Captain, can you describe the pumproom when you were in the pumproom in December?

A. Yes, sir.

Q. Can you describe the pumproom and tell us the condition of the pumproom?

Mr. Ray: I object.

The Court: Sustained. There wasn't any conditions we are concerned with here.

Q. Did you have occasion to examine the tools in the pumproom?

A. Yes, sir, I saw them laying around there.

Q. Can you tell us about the condition of the tools you had the opportunity to examine?

Mr. Ray: I object.

[fol. 44] The Court: Wait a minute, please. Yes, he should get down to the kind of tools we are concerned with here.

Q. Relative to the tools, were there certain tools in the pumproom?

A. Yes, sir.

Q. And have you worked with those tools?

A. Yes, sir.

Q. And can you describe the condition of those tools in December, 1955?

A. Well, they were in beaten and battered condition, as usual.

Q. Now, did you have an opportunity—wait a minute. When you say they are beaten and battered condition, can you describe them to the jury, please?

A. Well, none of the tools were very, you wouldn't call them new tools but they had been very beaten and battered, perhaps there for some time.

Q. What did the tools consist of?

A. Various wrenches, monkey wrenches and pliers and the wrenches had long iron bars, and things of that nature.

Q. Did they have steel tools and bronze tools?

A. Yes, sir.

Q. Can you tell us why they have bronze tools there?

A. Bronze tools are for non-striking.

Q. You have worked with those tools in the pumproom?

A. Yes, sir.

Q. Now, going from the pumproom, can you tell us about the lighting conditions?

A. Very poor.

Q. Why—describe that.

A. Well, whenever any of us go down there to do any work—

Q. Use the pointer if you want to.

A. Well, where most work was done in the pumproom would be down around this lower level here, around these pumps. Of course in the middle of the ship at any time, in this lower level, at all times it was necessary to use a flashlight in order to see anything in working on this grating level or below.

[fol. 45] Q. Were there any portable lights there?

A. No, sir.

Q. What time are you talking about,—are you talking about in December?

Mr. Ray: I object unless it is December 28, 1955. This man should not be allowed to testify to general situations on other days.

The Witness: May I say something on this? We have come to the point where this is only an arbitrary date that I can recall, it may be any time.

The Court: Well, your argument isn't really proper, Captain, but the point is the plaintiff himself here has set up this date as December 28 as the day of injury in the testimony he gave to the jury. So the testimony is limited to that day and time, what went on there.

The Witness: Yes, sir, I can understand but in my explanation—

The Court: Let's not put anything in the record that should not be there.

The Witness: All right.

Q. Captain, can you indicate on those pictures where the deadlights were or the portholes?

A. Yes, sir. Well, to the best of my recollection they were oh, perhaps about this level in the after bulkhead.

Q. When you say in the after bulkhead, were these port lights from the engineroom and firehold into the pumproom or did they go on the skin of the ship so lights could come through?

A. Well, they were in rather dirty condition. I don't imagine they had been cleaned since the ship's arrival.

Mr. Ray: I object. He was asked for the location of the portholes.

The Court: Yes, give the location, please.

[fol. 46] The Witness: Well, they were approximately, I would say, around the level of the cat-walk or just above, perhaps a foot above the cat-walk, in the after bulkhead, which would be this bulkhead.

Q. Those lights didn't shine outside?

A. No, sir.

Q. None of the portholes were on the outside skin of the ship?

A. No, sir. This is through the midship section here.

Q. You say you would have to use a flashlight. Can you tell us why in that area you had to use a flashlight in the pumproom?

A. No lights for proper lighting.

Q. Did you ever complain about it, Captain?

A. Well, it is a little hard to make a complaint.

Mr. Ray: I object.

The Court: Sustained.

Q. Now, the conditions that you have described in this pumproom, those were the conditions in the Steamer Orion in 1956?

A. Yes, sir.

Q. Were you Captain or Master of the Steamer in 1956?

A. Yes, sir.

Q. Were you Captain and Master of the vessel in 1957?

A. Yes, sir.

Q. You also served in other capacities such as First Mate, is that true?

A. Yes, sir.

Q. In 1957 that was the eighth year in the service of this defendant?

A. The eighth year, yes, sir.

. . . . . .

Q. Captain, in your experience can you tell us whether or not a seaman on board a vessel has to obey orders?

A. Absolutely, any order that is given a seaman is supposed to carry it out the same as the Navy or a merchant vessel.

Q. Did you have as a member of the crew a certain Thomas F. Michalic?

A. Yes, sir.

[fol. 47] Q. In what capacity did he sail in 1955 and '56?

A. Fireman.

Q. If you can recall, when did he come on board the vessel in 1955 and tell us the circumstances, how he came aboard.

A. Well, I think it was approximately around the 15th of March. I had known Mr. Michalic from another ship on the Cleveland Tankers, on the Meteor, where he had always been a good worker, and so forth.

Mr. Ray: I object to that as not responsive and move it be stricken.

The Court: Just answer the specific question.

Q. Where was the vessel at the time?

A. Erie, Pennsylvania.

Q. Where did you see Michalic?

A. Well, I was walking up one of the streets at Erie and I happened to run into Michalic.

Q. What did you do?

A. Well, the vessel was plagued with a shortage of men.

Mr. Ray: I object. The circumstances under which the plaintiff joined the vessel are entirely irrelevant.

The Court: Certainly it had nothing to do with the lawsuit we have here. Everybody says so, we all know that.

Q. Now, did you have an opportunity in October of 1955 to observe his physical condition?

A. He was in good healthy physical condition.

Mr. Ray: I object. This man is no physician. He can say what he observed, how he walked, what his appearance was.

The Court: It is an improper question.

[fol. 48] Q. Can you tell us how he walked, as you observed him walking in 1955 when he came on board the vessel?

A. He walked the same as anyone else, without any trouble at all.

Q. Did you notice him working?

A. Yes, sir.

Q. Did he work?

A. Oh, yes.

Q. Captain, were you apprised while you were on the Steamer Orion from October, 1955 until through December of 1955 as to whether or not this man had Buerger's Disease?

A. Yes, sir.

Q. Did you know that?

A. Yes, sir.

Q. Now in April of 1956 at the time that the Captain, Michalic and you, as First Officer made out the accident report, can you tell us whether or not you had an opportunity to observe him walking about on the ship?

A. Yes, sir, he was having considerable difficulty walking. In fact he had the top of one of his shoes removed and cut out.

Q. Did you examine his left foot?

A. Yes, sir.

Q. Tell us what you observed.

A. Well, it was in a very swollen and festered condition, definitely.

Q. Did you give him any advice, or anything done there?

A. Well, I gave him a hospital ticket, and advised him to go to the Marine Hospital with it. He had gone too far, it was getting worse all the time.

Q. Did he leave the vessel?

A. Yes, sir.

* * * * * * *

Cross examination of Harold F. Isenbach.

By Mr. Ray:

Q. Who is Captain Johansen?

A. He is President of the Cleveland Tankers.

Q. Tell the jury whether or not on November 5, 1957 you were discharged from the employ of Cleveland Tankers by Captain Johansen?

A. Because of the unseaworthiness of the vessel.

[fol. 49] Q. Will you answer the question?

A. Yes, sir, because of the unseaworthiness of this vessel.

Mr. Ray: I move the last remark be stricken.

The Court: I asked you a while ago before I knew you had been discharged, to please, when a question is asked answer the question and don't make voluntary declarations.

The Witness: All right.

The Court: Now, you have done it a little too much. I must instruct the jury to disregard what was added after the question was answered.

The Witness: Well, your Honor—

The Court: Wait a minute. Please let's have no more excuses. You are just a witness. We all have to act in accordance with the rules. Sometimes it is hard to get witnesses and lawyers to act according to the rules, but we must. You must answer the questions. The other side always has the right to ask more questions if the other side wants to. Please let it go at that.

Q. Going back to 1955, Captain, you left that vessel on December 19th, 1955 with the rest of the forward end crew, didn't you?

A. Well, if you say the date, I can check it here for you. I will check it (looks at record). Correct.

Q. So you have no knowledge of whatever condition obtained on that vessel on December 28, 1955, do you?

A. No, sir. I don't think I was near the ship on that date.

The Court: Now, wait a minute. That means that what you told us about going down and checking the gas and all

that could not have happened during the time you were talking about if you were off the vessel on the 19th.

[fol. 50] The Witness: I can't quite understand your question.

The Court: You told the jury about the things you did, about checking the tools in the pumproom, and those other answers given by you, either as of the date of December 28th when the man says he was hurt or thereabouts. Are you saying now you weren't on that boat after the 19th of December?

The Witness: Yes, sir.

Motion to Strike and Order Striking Portions of Testimony of Harold F. Isenbach

Mr. Ray: I move that the witness's testimony be stricken.

The Court: Ladies and gentlemen, everything this man said about what he had seen on or about that day in his previous testimony, all of which relating to December 28 when this plaintiff was hurt, and the date immediately around there, has to go out. He went off the ship December 19th and knows from his own discharge book he had no business talking about or mentioning it, and no business asking any questions about it if he wasn't there. Go ahead.

Mr. Ray: No further questions.

Mr. Sampliner: That's all.

The plaintiff rests.

* * * * * * * *

Defendant's Motion for Directed Verdict and Order Thereon

Mr. Ray: May it please the Court, the defendant at this time moves your Honor for a directed verdict in its favor on the ground that there is not sufficient proof of negligence of the Steamer Orion on the date in question as the proximate cause of the injuries that the plaintiff claims to have sustained.

In that connection I would like to advert first to the alleged negligence involving the lighting and the closeness of the space. I think the significant admission made by the plaintiff himself that he was able to remove 16 of the 20

nuts from the pump in question is a complete answer to the charge that the lighting was insufficient and that the space was too confining.

[fol. 51] Now, with respect to the tools themselves, the defendant relies upon the simple tool doctrine which, as the Court knows, simply stated, means that in connection with simple tools, of which the wrench in question was unquestionably one, the Master or the vessel owner and the defendant in this case was not obligated to inspect a tool of that type to see whether it was safe and suitable. And that is based upon the doctrine that as to such simple tools the opportunity of the employee himself is much greater.

There is no indication in this case that any defects that did exist, if they did exist, were brought to the attention of the defendant so that steps could be taken to have those tools replaced. For those reasons defendant requests a verdict in its favor on those facts be directed.

Mr. Sampliner: If your Honor please, in the case of Jacob vs. New York City, 315 U. S., 752, decided in 1942, we have a case on all fours.

I am going to ask the court reporter to read from his notes relative to the complaint made by Mr. Michalic.

(Reporter thereupon read from Page 10 of the record as follows:

> "A. I told him, I said, 'This tool is not very good, kind of beat up. It's very cold down here.' I said, 'This wrench keeps slipping off.' He said, 'Never mind about that,' he said, 'Do the job as best you can.' ")

Mr. Sampliner: In the case of Jacob vs. New York City, the Court said, Page 752, "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed, by the Constitution or provided by statute, should be jealously guarded by the courts. The present case is a suit by peti- [fol. 52] tioner under the Jones Act for personal injuries sustained when he fell because the wrench he was using to tighten a suit slipped under the torque applied to it."

I quote further from the decision:

"Petitioner inspected the wrench, found it defective and then asked three times for a new one. This satisfied the burden of inspection placed on his shoulders by the doctrine, and it was then for the jury to say whether respondent's failure to comply with those repeated requests was negligence on its part. To deny petitioner the right to have the jury pass on that issue because of the simple tool doctrine is to say that doctrine relieves the master of any duty to furnish reasonably safe and suitable simple tools in spite of the fact that he knows they are defective, and requires the servant not only to inspect simple tools for defects, but also to supply his own simple tools when he finds those of the master defective. This is so obvious a perversion of the Jones Act as to require no comment."

In this particular case—and that is the reason I had the court reporter read—where the seaman, such as Michalic, complained to the pumpman as to the condition of the tool, the complaint here that he made is the same, practically speaking for purpose of comparison, as in the Jacob case, and in the Jacob case the Supreme Court said it had to go to the jury.

Now, your Honor, may I say there has been a recent pronouncement, I put it in my trial memorandum, the second page, I would like to read.

"This case is brought under the Jones Act and the very recent case of Livanos vs. National Bulk Carriers, Inc., 2d Circuit, decided October 24, 1957, states: 'Under this statute the test of a jury case is simply [fol. 53] whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought' ", citing: Rogers vs. Missouri Pacific Railroad Co., 352 U. S. 500, 506, and Ferguson vs. Moore-McCormack Lines, 352 U. S. 521-523.

Now, if your Honor please, as far as lighting conditions are concerned, that is strictly a jury question in my estimation, because the evidence has been given not only by Michalic but also the other witnesses. I don't recall each bit of testimony from the other witnesses, but Michalic stated the condition and up to the present time it is uncontroverted. Consequently, basing my argument still on United States Supreme Court decisions, I contend this case has to go to the jury.

Mr. Ray: May I just briefly answer. I want to advert to the Jacob case and then I will conclude my argument. Inasmuch as Mr. Sampliner is relying upon Jacob vs. New York City, I would direct the Court's attention to the language on page 757: "For the only possible basis for the doctrine which is compatible with the provisions and policy of the Jones Act is that the Master is not negligent in the case of defective simple tools because the possibility of injury from such tools is so slight as to impose no duty on him to see that they are free from defects in the first instance or to inspect them thereafter." The Court then cites Newbern vs. Great Atlantic & Pacific Tea Co., 68 Fed. 2d 523, and Hedicke vs. Highland Springs Co., 185 Minn. 79, 239 N. W. 896—

"Or to put it another way, the master is relieved of the duty to inspect simple tools for defects because the servant's opportunity for ascertaining such defects is equal to or greater than the master's."

In that case there was a request by the individual using the tool on three separate occasions to get a new wrench. [fol. 54] The Chief Engineer said he had ordered a wrench, and this accident occurred to Jacob before the new wrench arrived.

Now, as I analyze the holding of the Supreme Court, I think it is right that they left unchanged and still the law of the doctrine in the Newbern vs. Great Atlantic & Pacific Tea Co. case, also the O'Hara vs. Brown Hoisting Machine Company in 171 Fed. 394. I think Jacob vs. New York is clearly distinguishable on the facts that are before us in this trial.

Mr. Sampliner: I would like to read from page 756:

"The simple tool doctrine, used by the courts below to bolster their belief that the evidence was insufficient, does not affect our conclusion. In the first place, the contrariety of opinion as to the reason for and the scope of the simple tool doctrine"—that was the sentence before the sentence Mr. Ray read.

The Court: Well, gentlemen, I am going to require the defense to go forward here. But, first, let's talk a little about the Jacob case, because obviously the plaintiff is trying hard to get under it.

We start out here, it seems to me as the case goes along, it sort of degenerates into a discussion of everything but the main thing, and the main thing is negligence.

We start out here with a man whose left leg is numb in 1949, he had to stop when he was walking. You heard the doctors describe what is causing that. So, seven years before he is hurt he has Buerger's Disease and he hits the same big toe with a brick in '52, after having had a sympathectomy in 1951 to disconnect the nerves so he wouldn't feel it so much. So he is very conscious of his condition. As I understood, he really stopped smoking February 3rd of this year when some doctor told him he should not do that, some doctor who told him he was his own worst enemy.

Now, the lawsuit degenerated into a lot of evidence about Buerger's Disease and everything that went with it. [fol. 55] Some of the testimony seems to indicate that if this man had stopped smoking in '51, as he should have done, it would not have progressed. Dr. Bright told about the 150 or 175 cases he had treated who quit smoking and got along all right, but 15 percent of those who kept on smoking had to lose a foot. He quoted Dr. Silberg, who seems to be the top man in that field as having 436 cases; and none of them had an amputation because all of them quit smoking. It is the testimony in this case this man hasn't quit smoking yet. He knows the danger. And there were two statements that were volunteered by plaintiff's doctor. I say "volunteered" because no one asked him. He made quite a habit of volunteering in this case. In one statement he said "It is awful hard to give up smoking." Then he went on in the next minute after giving a medical opinion, to expound a theory that had nothing to do with the lawsuit, that "many

of the people who get lung cancer and smoke, just couldn't help it."

Now, then, we have a petition here and the petition is the foundation of the claim, and no one has yet talked about the petition. No one has yet talked about the difference between the petition and the proof. Here is what the petition says about the wrench that is supposed to have hit him on the foot, which would be a jury question to say whether it did or not, because, knowing he had Buerger's Disease, he certainly knew how dangerous it was, knowing any blow would start an aggravation of that condition, one would almost come to a quick conclusion, if it fell on his foot he would run and tell somebody in the next ten minutes or hour and not wait for a month.

Getting back to the petition it states he was "using an old defective wrench in an unseaworthy condition in that the teeth and grip of the wrench were worn and defective."

I haven't heard anything about the teeth or grip. All that I heard is what amounts to descriptive adjectives, in [fol. 56] conclusion, that it was "an old beat-up wrench", "the wrench was all chewed up", "the tool wasn't good", "the wrench slipped off". And the quotation just given me was read by the reporter "this tool is not very good, kind of beat-up". "This wrench keeps slipping off."

Now, let's have some basis in this case for the Circuit Court of Appeals. They will be trying to find out whether or not plaintiff proved it was a defective wrench. Does he prove it by saying it is an old beat-up wrench?

Let's get into the Jacob case and see what proof they had there. One of the plaintiff's duties there was to change oil strainers, and this was done about three times a week, and required the removal and replacement of a manifold head, housing the strainers, which was held in place by six studs and nuts. When the manifold was replaced, the nuts had to be very tight. The best tool to remove and tighten the nuts was a straight-end wrench fitting a 1¼" nut. Petitioner used an S-shaped end wrench of the proper size which was "well worn", "had seen a lot of service," was "a loose fit" and "had a lot of play in it." There was about 1/16 of an inch "play" in the jaws; it was worn.

The wrench was about 18 inches long and the "play" at the end was "about an inch."

There is a description of a wrench, and any court that sees that, and the Supreme Court wrote it, can practically see the wrench. Further along a little more description, page 755: "There was about 5/8 of an inch of thread on the studs, and petitioner had changed the wrench on one nut four times. As he started the fifth tightening, the wrench slipped, causing him to fall from the 18-inch square platform on which he was standing to the cat walk 18 inches below."

Now, what did the case turn on? The Court went on to say it was a close case. It wound up with a pretty close court. Justices Murphy, Frankfurter and Jackson concurred in the result. I should not have said it that way. [fol. 57] Justice Murphy wrote the opinion and Justices Frankfurter and Jackson concurred. So three on that side and three on the opposite side. "The Chief Justice, Mr. Justice Roberts, and Mr. Justice Reed are of opinion that the judgment below should be affirmed." So, three to three on the case and they called it close.

What did they rule? Here you have a man who was supposed to do a little job three times a week. He asked the chief engineer for a new wrench three times. Three weeks elapsed between the time he made the first request and the time he was hurt. Two days before he was hurt he had again asked for another wrench, and the Court said that inasmuch as this boat was just going back and forth across the river, touching shore each time, there was opportunity to the point where the jury had the right to take the case; there was opportunity to have gotten the wrench, and it was up to the jury to decide whether or not there was negligence existed in the failure to get one over that three weeks period. So I don't see where the Jacob case applies here.

But I think we are in a position here where we should ask the defendant to go forward to clear up a few things which have been mentioned here. We have a ship captain, who, if he had a complaint, should have made it to the Coast Guard. I want the jury to get the whole story, so let's go ahead.

Before that I should tell you one other thing: this business of lights—that was taken care of by plaintiff having said he had no difficulty in seeing the bolts. And I wanted to let you know now the lights are out.

* * * * * * *

[fol. 58] Defendant's Testimony

* * * * * * *

Direct examination of LEON McCANDLESS.

By Mr. Ray:

Q. What is your name, please?
A. Leo McCandless.
Q. Where do you live?
A. Golconda, Illinois.
Q. Do you have a street address there?
A. No, sir.
Q. Is that in the southern part of Illinois?
A. Yes, sir.
Q. What is your occupation, Mr. McCandless?
A. Marine engineer.
Q. How long have you been a marine engineer?
A. About 18 years.
Q. What license do you hold?
A. Hold a Chief Engineer's now.
Q. By whom are you now employed?
A. Cleveland Tankers.
Q. And does Cleveland Tankers own and operate the Steamer Orion?
A. Yes, sir.
Q. On December 28, 1955 were you employed on that vessel?
A. Yes, sir.
Q. What capacity?
A. First Assistant.
Q. Was the vessel laying up for the navigation season of 1955 at that time?
A. Yes, sir, it was laying up.
Q. On the morning of December 28, 1955 what, if any, orders did you give that had to do with work to be done in the pumproom on that vessel?

A. Well, I told the pumpman to raise the casing on the centrifugal pump and check the moving parts.

Q. How often is that type of work done during the year?

A. Done once a year.

Q. They would take it off at lay-up and put it back on fit-up?

A. In fit-up.

[fol. 59] Q. Did you tell the pumpman he would have any assistance in doing the work?

A. Yes, I told him I would send a man to help him.

Q. Did you send a man to help him?

A. Yes, I sent Mr. Michalic to help him.

Q. Did you examine the pumproom at the time that work was going on?

A. I was in and out of there at times.

Q. Did you actually see the men working?

A. No, I could not.

Q. You have no recollection of those details?

A. No, I don't.

(Thereupon photographs marked Defendant's Exhibits A, B and C.)

Mr. Sampliner: If the Court please, may we have a minute to look at the pictures, before objecting or allowing these to go into evidence?

The Court: Surely.

Mr. Sampliner: Thank you.

No objection to these pictures.

Q. Will you describe generally the location of the pumps in the pumproom of the Steamer Orion as they were on December 28, 1958?

A. Yes, there are five pumps in the pumproom, on the after side of the pumproom. There is two centrifugal pump on the port and starboard side.

Q. Perhaps you can come down to this drawing made by Mr. Sampliner and point out to the jury where these are, using this area as the pumproom. This area right here is the pumproom, and can you point out to the jury where the various pumps were located?

A. Well, there would be one centrifugal pump here, the other centrifugal pump would be here, reciprocating pump

here, and one here, a bilge pump in between two centrifugal pumps (indicating).

[fol. 60] Q. Which pumps were the ones the casings to be removed from under your orders?

A. The two centrifugal pumps.

Q. Point out where they are.

A. The ones here and here.

Q. Is there a cat-walk goes athwartships in the pumproom?

A. Yes, sir.

Q. What are the approximate distances away that those pumps you are talking about are from that cat-walk?

A. Well, the cat-walk from the casing that was taken off was about ten inches head of it and 16 inches above it.

Q. That is true with respect to both pumps?

A. Both pumps are the same.

Q. I show you what has been marked for identification as Defendant's Exhibit A, and ask you to look at it and explain to the jury what it is.

A. Yes, that is the starboard side of the pumproom showing the centrifugal pump and the piping around it.

Q. Does it show the casing? A. Yes, it shows the casing raised just from the pump.

Q. Is that or not a fair representation of what it purports to portray in the pumproom of that vessel as of December 28, 1955?

A. Yes, it would be about the same.

Q. I show you what has been marked for identification as Defendant's Exhibit B and ask you what that is.

A. That shows the centrifugal pump with the casing raised to show the upper casing and lower casing to show the moving parts.

Q. Is the cat-walk in that picture?

A. Yes, it shows the engine cat-walk.

Q. What is the situation whether that is or is not an accurate portrayal of that pump in the condition it was on December 28, 1955—I am talking about the general description, not the exact way it was, but is that a fairly accurate description of the pump and its relationship to the cat-walk and pipes as of that day?

A. Yes.

[fol. 61] Q. I will show you Defendant's Exhibit C and ask you to identify that.

A. This is the centrifugal pump with the casing raised and shows the cat-walk and the piping around the pump.

Q. What is the situation as to whether that is an accurate and fair portrayal of the area it portrays as of December 28, 1955?

A. Yes.

Mr. Ray: I offer these three exhibits in evidence.

Mr. Sampliner: No objection.

The Court: They may be received.

Q. Now, Mr. McCandless, holding the exhibit up like that, I am now referring to Exhibit A, will you kindly point out to the jury where the pump is and where the pump casing is?

A. The pump is right here and the casing is raised above it, hanging up on chain falls above the pump.

Q. I will ask you to refer to Defendant's Exhibit C and to point to the jury where the pump is and also where the pump casing is and where the bolts are on the pump itself.

A. Well, here is the pump, the lower part of the pump, the moving part, and here is the casing hanging up above it, and the studs up in the lower half of the casing that are on the pump now.

Q. And Defendant's Exhibit B is a close-up of the starboard turbine pump, is that right, reciprocating pump?

A. No, that is a centrifugal pump.

Q. Centrifugal pump?

A. Yes, sir.

Q. With the casing lifted?

A. Lifted.

Q. Showing the bolts and showing the holes in the casing and showing the cat-walk?

A. That's right.

Q. Now, how many bolts are there on that pump that the casing fits on, do you recall? Have you ever counted them?

A. No, there are approximately twenty, I would say.

[fol. 62] Q. ow long did the lay-up work continue during 1955 and int 56?

A. We were finished January 6.

Q. And during that period of time did Mr. Michalic tell you that he had sustained any injury or any accident of any kind?

A. No, he didn't.

Q. Did he at some later date tell you he had received an injury?

A. Yes, after he came back to work and just before he got off in the Spring.

Q. Did you observe him during the period from the 28th of December until the 6th of January as to whether he was performing his duties or not?

A. Yes, he was performing his duties.

Q. Where was the vessel when you rejoined it?

A. It was at Cleveland, tied up at Allied Oil Dock.

Q. How long did you work in fit-out during the Spring of '56?

A. It would be approximately three weeks.

Q. And was Mr. Michalic a member of the crew of the vessel at that time?

A. Yes, he was.

Q. And did he perform his duties?

A. Yes, he worked.

Q. What did you work, eight-hour days at that time?

A. Yes, sir.

Q. What type of work did Mr. Michalic do?

A. Well, the general working on boilers and pumps. The work had to be done and put back together.

Q. And he left the vessel on April 1st, is that correct?

A. I don't remember the date.

Q. But anyway it was some time subsequent to the time the vessel got under way there navigating?

A. Yes.

Q. Now, what is the situation with respect to the tools in the pumproom, what type of tools did you have in the pumproom on December 28, 1955, just generally speaking what kind of tools?

A. Well, they are special alloy tools, non-sparking, and they are only used in the pumproom.

Q. What did they consist of?

A. Well, they consisted of different size wrenches and hammers and scrapers, and different things we would need in taking a pump apart.

[fol. 63] Q. What is the situation with respect to the removing of the nuts on the flange or pumphead, do you or do you not have a specific type of wrench that is used for that purpose?

A. That's right, we have an open-end wrench of certain size to fit the nuts on that pump.

Q. And that tool is only used in the pumproom for that purpose, is that right?

A. That's right.

Q. Now, prior to December 28, 1955 had you individually made any inspection of the tools in the pumproom?

A. No, I hadn't.

Q. What is the situation as to what is done on that vessel to replace any tools that are worn?

A. Well, usually in October of the year before we lay up the Chief goes down—

Mr. Sampliner: I object.

The Court: He may answer what is done.

A. (Continuing) He goes to the pumproom and checks over the tools to see if any worn or missing, so as to have the proper tools during the lay-up.

Q. Now, while Mr. Michalic and you were on the vessel either prior to December 28, 1955 or subsequent to that time did he tell you he had Buerger's Disease?

A. Yes, sir.

Q. Did you know what Buerger's Disease was?

A. No, sir.

Q. Did he have any difficulty performing his work?

A. Well, he got around and fired O.K.

Mr. Ray: You may cross-examine.

Cross examination of Leon McCandless.

By Mr. Sampliner:

Q. Would you mind going to the blackboard and drawing that open-end wrench for removing the bolts on that pump, and give us a complete description of it?

[fol. 64] Mr. Ray: If you can.

A. Which wrench is this, now?

Q. You just testified there is a special wrench used for the removing of the bolts of the starboard centrifugal pump, is that right?

A. There is one wrench in the pumproom that is used for that, yes, an open end wrench.

Q. Would you kindly draw that?

A. (Witness draws open-end wrench.)

Q. What is the length of the wrench?

A. The exact length I couldn't say; it is around ten or eleven inches, approximately.

Q. What is the weight?

A. It weighs two or two and a half pounds.

Q. And is this the claw part of it, what is the measurement of the claw part?

A. It is marked to 1⅝ inch nut.

Q. And when you refer to that, pointing to your diagram, this would be the claw?

A. Yes, that is the opening that fits the nut.

Q. You say the measurement is what?

A. Marked for 1⅝ inch nut.

Q. Now, what type of metal is this tool made of?

A. That I wouldn't know. It is an alloy, special made tool for pumproom work.

Q. Recalling to you December, 1955, did you have an opportunity to examine that tool?

A. I did not examine it.

Q. Therefore you do not know the condition of that tool, do you?

A. No.

Q. Now, how long have you been in the employ of the Cleveland Tankers?

A. Seven years.

Q. Are you now Chief Engineer?

A. Yes, sir.

Q. What vessel?

A. Mercury.

Q. Do you expect to go back to the Mercury this coming season?

A. Yes, sir.

[fol. 65] Q. Now, in December, 1955, you were on board the vessel?

A. Yes.

Q. Now before we leave the board here, can you tell us whether or not there were any teeth in here or whether it was blunt here?

A. An open-end wrench is smooth, there is no teeth inside of an open-end wrench, the jaws of the wrench.

Q. Would you be able to tell us the last time you saw that wrench prior to December, 1955?

A. No, I would not.

Q. Tell us the exact words you used when you gave the order to Michalic to accompany the pumpman into the pumproom.

A. I don't think I could say the exact words.

Q. Well, approximately, did you give an order?

A. Well, I told him to go in and assist the pumpman in the pumproom.

Q. And was the pumpman present at the time you gave the order?

A. Don't remember.

Q. Now, where was this order given to Michalic?

A. I don't remember.

Q. But you did give the order?

A. Yes.

Q. And, Chief, in order to get into the pumproom does the man have to leave the engineroom and firehold to go outside on deck to get into the pumproom?

A. That's right.

Q. Now, was this order given on or about the 28th day of December, 1955, to the best of your recollection?

A. Yes, I would say it was.

Q. Did you tell Mr. Michalic what type of work he was going to do with the pumpman?

A. He was going to assist the pumpman to take the pump apart.

Q. What was the capacity of Michalic on board the Steamer Orion?

A. He was a fireman.

Q. And the duties that you were going to send him to perform, was that work to be done by a fireman?

A. During lay-up the fireman does work on pumps, also, as well as in the pumproom.

[fol. 66] Q. That is not his customary work?

A. During lay-up, yes.

Q. As fireman he handles the propulsion machine, doesn't he?

A. No, he handles the boilers, fires the boilers during the running season.

Q. What does he do during the fit-out, what does he do during that?

A. He works on the boilers and the pumps and the valves.

Q. In other words, in getting the vessel ready for navigation he follows your orders, doesn't he?

A. That's right.

Q. All of this work is done under peremptory orders, isn't it?

A. Yes, sir.

Q. Michalic told you about this accident he had, didn't he?

A. Before he got off in the Spring.

Q. Was he a good workman?

A. He worked, yes.

Q. And prior to December 28, 1955 was he able to work and carry on his duties?

A. Yes, sir.

Q. Did you testify on direct examination that he apprized you of the fact he had Buerger's Disease?

A. Yes, sir.

Q. You permitted him to work?

A. I didn't know what Buerger's Disease was.

Q. Did you permit him to work after being apprized of that fact?

A. Yes, sir.

Q. Now, these studs or bolts, are they shown in the pictures here, referring to Defendant's Exhibits A, B and C?

A. One or two of them are shown.

Q. Would you be kind enough to show us?

A. This one here—they are just studs—right there (indicating).

Q. These are the studs?

A. Yes, those are studs.

Q. Will you point that out to the jury? You are referring to what exhibit?

A. That is B. Those studs there, right here. You can see them on the casing.

Q. How do they remove those studs?

A. They do not remove the studs.

Q. How did they remove the bolts that fasten on to the studs?

A. They remove the nuts off of them.

[fol. 67] Q. How do they do that?

A. They take a wrench, loosen them up and unscrew them.

Q. Don't they have a mallet to remove the nuts?

A. To loosen the nut, yes.

Q. What do they do that for?

A. To pull the casing down tight together so it won't leak when it is used as a pump.

Q. This particular pump is a piece of machinery used for what purpose?

A. For pumping cargo.

Q. What do you mean by pumping cargo?

A. Pumping out the cargo we carry, gas and oil.

Q. Have you ever counted the number of studs and nuts on this centrifugal pump on Defendant's Exhibit B?

A. No, I haven't.

Q. Why did you say there were only twenty?

A. I didn't say. I said approximately twenty.

Q. There might be thirty?

A. There might be more than twenty or less.

Q. Referring to this picture, is that the starboard centrifugal pump in Defendant's Exhibit B?

A. Yes, sir.

Q. Now, can you tell us where the lights are with reference to this starboard centrifugal turbine pump in the pumproom?

A. There are two lights on the overhead.

Q. How far away from this piece of machinery, this starboard turbine pump?

A. The height I can't give you.

Q. How high is it from the deck where this is located to the roof or to the top of the pumproom?

A. I wouldn't know.

Q. Would it be higher than this ceiling here?

A. Yes.

Q. Would it be twice as high as this here?

A. I wouldn't say it was, no.

Q. Would you say one and a half?

A. Approximately.

Q. What was the kind of light bulb they had, can you give us the voltage?

A. No. In fact they are inclosed lights, gas-proof.

[fol. 68] Q. Gas-proof, that means they are hermetically sealed up against the bulkhead?

A. Yes.

Q. Tell us the type of bulb used there.

A. The regular light bulb.

Q. Of 100 or 150?

A. 100, I would say.

Q. It would be that distance, one and a half as high as this Court Room is?

A. Yes.

Q. There are two of them?

A. Two are in the ceiling.

Q. Where in the top of the pumproom, starboard and port?

A. Starboard and port sides.

Q. Isn't it true when you went down there you had to use a flashlight to do a lot of work near the cat-walk?

A. No, sir, because there was three portholes in the after bulkhead that had 150 light bulbs behind them to throw light into the pumproom.

Q. What was the condition of the dead-lights on December 28, 1955?

A. I can't say.

Q. Would you say they were dirty?

A. I wouldn't say.

Q. You wouldn't say they were or were not?

A. No.

Q. If they were dirty would the electric light reflect through the dirty pane of glass?

A. The light reflected through there.

Q. You don't know what the condition was on December 28, so you don't know?

A. They wasn't that dirty they couldn't see through.

Q. Please answer the question. You don't know, do you?

A. On that date I don't remember if I was in there or not, but they always had—

Q. Please answer my question. You don't know, do you, on that date?

A. No.

Q. Now, Chief, why did they use a portable light if there was sufficient light—that would be the extension cord—why was an extension cord used there?

A. To give more light.

[fol. 69] Q. Wasn't it because of the intricate work of getting in under the cat-walk and around the cat-walk down near the bow of the vessel here?

A. I didn't get under the cat-walk.

Q. At or near the cat-walk. In other words, to remove these casings you have to get down on the deck that is below the cat-walk?

A. It is alongside of the cat-walk.

Q. Can you tell us, Chief, using this picture here, as to the dimensions from bulkhead to bulkhead, as far as the pumproom is concerned?

A. You mean forward and aft or athwartships?

Q. Fore and aft.

A. Fore and aft, approximately ten feet.

Q. That means it is ten feet, which would be about from where I am standing over to the edge where that jury box starts, isn't that true—am I about ten feet from that?

A. Back a little farther.

Q. Would that be about ten feet (indicating)?

A. Yes.

Q. And this machinery you have described, as in Defendant's Exhibit A, is that in that areaway of ten feet where I am from here to the beginning of the jury box?

A. Yes, sir.

Q. This Defendant's Exhibit A reflects the type of machinery in there, is that right?

A. No, sir.

Q. What do you mean by that—is there more machinery than what we are seeing here?

A. Yes, sir, there is another pump there.

Q. There is more machinery. So, therefore, the more

machinery would be on the port side of the vessel, in addition to this machinery as described in Defendant's Exhibit A?

A. That's right.

Q. Going to Defendant's Exhibit C, is this a true representation, although taken February 24, 1958, is that a true representation of the bulkhead fore and the bulkhead back here aft, which I can see a portion of?

A. That is the bulkhead, but you have them mixed up. This is aft and that is forward.

[fol. 70] Q. Therefore, forward is here where my right hand is, and this would be aft (indicating)?

A. Yes.

Q. Now, then, Chief, these are rails here on the cat-walk, aren't they?

A. That's right.

Q. Now, when Michalic had to remove the nuts off the studs here, as far as this casing is concerned on this starboard pump, he had to go off the cat-walk and get down below the cat-walk; in other words, his feet were on a lower level than the cat-walk, isn't that true?

A. Yes.

Q. And that is in Defendant's Exhibit C—right?

A. Yes.

Q. Were you in the pumproom on December 28, 1955?

A. I don't remember.

Q. Do you know where the position of the extension light was on that particular day?

A. No, sir.

Q. Did you ever use a flashlight in the pumproom?

A. To work?

Q. Yes.

A. No, sir.

Q. Did you ever use one?

A. No, sir.

Q. Are you sure?

A. Yes, sir.

Q. Did you ever use the flashlight while in the service of that steamer?

Mr. Ray: I object.

The Court: We are not concerned with anything but this pumproom.

Q. Were you on board the vessel in October, 1955?
A. Yes, sir.
Q. In what capacity?
A. First Assistant.
Q. Do you remember the occasion when Michalic came on board and entered the service of the SS Orion at Erie, Pennsylvania?
A. I was aboard then, yes.
Q. Can you tell us from your personal observation how he walked when he came on board the vessel?
A. I don't remember him coming aboard at that time.
[fol. 71] Q. Can you tell us when he first came aboard the vessel in October if you ever watched him walking around the ship?
A. Yes, sir.
Q. How did he walk?
A. He walked with a slight limp.
Q. You mean when he first came on board that boat?
A. Yes, sir.
Q. In October of '55?
A. In October.
Q. In December of '55 did he have the same limp?
A. Yes, sir.
Q. Did he have a more pronounced limp after his accident?
A. I wouldn't say he did.
Q. When he left the vessel on April 1st, 1956, can you tell us about his limp?
A. I couldn't say it was much worse.
Q. Do you know whether or not he had his shoe cut out?
A. I don't remember that he did.
Q. Did you examine and see that his toe was festering?
A. No, sir.

* * * * * * * *

Direct examination of HANS HANSEN.

By Mr. Ray:

Q. What is your full name?
A. Hans Hansen.

Q. Where do you live?
A. Gary, Indiana.
Q. What is your street address?
A. 958 Lane Street.
Q. By whom are you employed?
A. Cleveland Tankers.
Q. How long have you been employed by Cleveland Tankers?
A. Oh, about twelve years.
Q. What certificates do you have issued by the United States Coast Guard?
A. A. B., as a pumpman.
Q. An able-bodied seaman, is that right?
A. That's right.
Q. How long have you had that certificate?
A. The certificate I only had about over a year but I have been pumping there for about eight years.
[fol. 72] Q. On various vessels owned by Cleveland Tankers?
A. Just on the Orion.
Q. Were you pumpman on the Orion on December 28, 1955?
A. Yes, sir.
Q. With particular reference to that day did you or did you not receive any order from the First Assistant Engineer as to any work to be done in the pumproom and involving the pumps?
A. Well, I had orders to take the casings off the two main pumps in the pumproom.
Q. Take the cases—
A. The casings.
Q. They are the two main pumps?
A. Yes.
Q. Are they the centrifugal pumps?
A. The two centrifugal pumps.
Q. Now, were you advised at that time as to whether you would have any help doing that work?
A. I was advised I would get some help down there.
Q. Well, did you get some help?
A. Yes, sir.
Q. Who came into the pumproom to help you?
A. Tom. I don't know his last name.

Q. Michalic?

A. That's right.

Q. When did you begin that work on the morning of December 28?

A. About 8:00 o'clock in the morning.

Q. Would you describe in as much detail as you can remember what you and Mr. Michalic did after you went into the pumproom with respect to removing the casings from the pumps?

A. I gave him a hammer and a wrench there, a 1⅝ wrench to take the nuts off the casing.

Q. And did you or did you not show him how to take the nuts off?

A. No, I didn't show him how.

Q. You just handed him the wrench and the mallet?

A. That's right.

Q. Can you describe the wrench, what type wrench it was?

A. Just an open-end wrench.

Q. Approximately how long was it?

A. I would say about twelve inches.

[fol. 73] Q. Do you have any idea how much it weighed?

A. About two pounds, 2½ pounds.

Q. What material was the wrench made of?

A. Sparkproof alloy.

Q. What was the mallet made of?

A. Same thing.

Q. Also spark-proof alloy?

A. That's right.

Q. In what condition was that wrench you gave Michalic?

A. It was in a good condition.

Q. Did you notice any chipped or worn places on it?

A. No.

Q. What was the condition of the mallet?

A. Same thing, it was a good one.

Q. Did the two of you start to work on the same pump?

A. No, each worked on one pump. I worked on the other.

Q. Which pump did you work on?

A. He worked on the port pump and I worked on the starboard pump.

Q. How long did you remain in the pumproom on that morning doing the work you were doing?

A. I don't remember.

Q. During the time that you were there did you observe Mr. Michalic doing his work at all?

A. No.

Q. In other words, you went to your work and he went to his, is that right?

A. Yes.

Q. At any time while you were there did he complain to you about the condition of that wrench?

A. No, sir.

Q. Did you have any conversation with him at all about the wrench?

A. No.

Q. At any time while you and Michalic were working there did you see that wrench drop out of his hand?

A. No.

Q. Did you hear it drop to the deck?

A. No.

Q. Now, how long did you remain on that vessel after December 28, 1955, during the lay-up?

A. I think around the 5th or 6th of January.

Q. Did Mr. Michalic remain on the vessel during that time also?

A. Yes.

[fol. 74] Q. Did he continue to do his work?

A. As far as I know he did.

Q. At any time during that period did he tell you he had dropped a wrench on his toe?

A. No, sir.

Q. Did he at any subsequent time tell you he had dropped the wrench?

A. He never mentioned anything to me about it.

Mr. Ray: You may cross-examine.

Cross examination of Hans Hansen.

By Mr. Sampliner:

Q. Are you going back to work for the Cleveland Tankers this coming year?

A. I expect so, yes, sir.

Q. You received an order from the First Assistant Engineer to take these nuts off the casings of the centrifugal pumps, is that right?

A. That's right.

Q. Where did you get this order?

A. Where did I get it?

Q. Where did he give it to you?

A. I got that up in the Mate's room before we went to work at 8:00 o'clock in the morning.

Q. Did you ask him for some help to do that work?

A. That's right.

Q. What did he say to you?

A. He said he would send a man over there, there would be a man over there at 8:00 o'clock.

Q. And did he order a man over there?

A. Yes.

Q. Was the man he ordered over there this man here (indicating plaintiff)?

A. That's the man.

Q. Do you remember what day of the week this was?

A. No, I couldn't.

Q. Do you remember the date, whether it was December 27, 28, 29th or any other date in December?

A. No.

Q. Where did you give him the hammer and wrench?

A. Down on the floor plate there where the pumps are.

[fol. 75] Q. Handing you Defendant's Exhibits A, B and C, please be kind enough to tell us in what portion of the pumproom you gave him the hammer or the mallet and the wrench?

Mr. Ray: I assume you mean where the two people were standing at the time he handed him the wrench and mallet?

Mr. Sampliner: Yes, sir.

A. What do you want me to do?

Q. Show us on that picture.

A. I would say I was right here (indicating).

Q. Hold it up. Where were you standing?

A. On the floor plate here.

Q. That is the cat-walk?

A. If you want to call it.

Q. Where was he?

A. He was right next to me.

Q. Was that near the starboard centrifugal pump?

A. This is the starboard pump here.

Q. And when he received this hammer and wrench what did you tell him to do?

A. Knock off them nuts around the casing there.

Q. Did you show him the nuts he had to knock off?

A. No. I told him the casing. There is only one pump there on that side, centrifugal pump.

Q. When that happened did he have to leave the cat-walk and get down to a lower level?

A. Yes, sir.

Q. Did you watch him work?

A. No, sir.

Q. Can you tell us where the lights were at that particular point?

A. Right here in this picture, right on top of this shaft here there is a light right in here.

Q. How far up?

A. I would say about a foot on top of that shaft.

Q. Where did that light come from?

A. Comes from the engineroom.

Q. That light has to penetrate through a dead-light, that is, a window?

A. Through a porthole.

[fol. 76] Q. How big is the porthole?

A. Oh, ten or twelve inches.

Q. How thick is the glass in the porthole?

A. I would say half an inch, maybe more, I couldn't tell you.

Q. What was the condition of this port-light, was it clean or dirty?

A. I couldn't tell you.

Q. When you gave him the hammer and the wrench did you stand there on the cat-walk and watch him carry out your orders?

A. No, sir.

Q. What did you do?

A. I went over to the pump to work, to the other pump.

Q. How long did you work on the other pump?

A. I would say approximately an hour.

Q. Did you go forward to shut off a valve, did you leave the pumproom?

A. I left the pumproom. I don't know anything about a valve.

Q. Why did you leave the pumproom?

A. To go and get the chain fall to lift the casing up.

Q. How long were you away from the pumproom?

A. I couldn't tell you exactly.

Q. Would it be two hours?

A. No.

Q. Would it be an hour?

A. It might be a half an hour.

Q. When you came back was he still working on the casing?

A. I don't remember.

Q. You don't remember?

A. No.

Q. Was he there when you came back?

A. I guess so.

Mr. Sampliner: I object to the word "guess".

The Court: The answer may remain.

Q. Where was he standing when you came back?

A. I don't know. I can't say where he was at when I got back.

Q. How many wrenches of this same type did you have in the tool chest of the pump room?

A. Oh, I would say three of the same type.

Q. Three of the same size?

A. That's right.

[fol. 77] Q. Which one of those three did you give him?

A. They are all three of them are just good.

Q. You say "good" what do you mean by "good"?

A. They weren't chipped or anything; they were in good condition.

Q. When did you examine them to see that they were in good condition?

A. Just before I took them out of the tool chest, because they only use them wrenches once a year.

Q. Can you tell us what time of the day you examined those wrenches?

A. No, I can't tell you that.

Q. Can you tell us whether there was any identification mark on any one of those wrenches you selected to give him?

A. No.

Q. Now, you didn't observe him at all doing his work, did you?

A. No, sir.

Q. Did he complain to you about the wrench slipping off of the nut?

A. No, sir.

Q. Did he complain to you about the lighting conditions?

A. No.

Q. Did you see the wrench slip off any of the nuts?

A. No, I didn't.

Q. You were working on the same job on the other centrifugal pump, weren't you?

A. Yes, sir.

Q. So, therefore, you were using one of the other wrenches, isn't that true?

A. That's right.

Q. And that wrench was specially built to fit that particular nut for that particular job, is that right?

A. Yes.

Q. Were those the same wrenches that were on the vessel when you came there twelve years before that?

A. No, I got a new set of tools there while I was there.

Q. How many years ago—eight years ago?

A. No, I would say it might be five years ago.

Q. So, therefore, these tools had been used four or five years, is that right?

A. That's right.

Q. And that is heavy work, isn't it, down there?

A. I wouldn't say, not too heavy.

[fol. 78] Q. Don't you have to strike that wrench with a lead mallet?

A. You strike it, yes, to get the nuts loose.

Q. Why are those nuts so firmly put on?

A. That is to form a gasket there so the pump won't leak.

Q. When you use that wrench you have to hit it with strength to get the nuts off, don't you?

A. Yes.

Q. And they are put on there pretty solid?

A. Yes.

Q. And you say that there was nothing wrong with the edge of those wrenches after being in use for five years, is that right?

A. That's right.

Q. Did you hear any tools drop?

A. No.

Q. Did you drop any tools?

A. Not that I remember.

Q. You don't remember if you dropped any tools or not?

A. I would say no.

Q. Did you throw any tools down?

Mr. Ray: I object.

The Court: Sustained. What he did isn't important here. If he dropped something it wouldn't be important. The question is did your man drop something?

Q. You said in direct testimony that he never mentioned anything to you about dropping the wrench on his left great toe, is that right?

A. That's right.

Q. You weren't his roommate, were you?

A. No.

Q. When did he leave the vessel in 1955, or the Winter of '56?

A. I think around January 5 or 6, when everybody got off.

Q. Was he a good workman?

A. Well, he worked with me, he worked all right.

Q. Now, when you came back to the vessel in March of 1956 did he help you again?

A. I don't remember. I don't think so.

[fol. 79] Q. You don't think so. Now, see if you can recollect, Mr. Hansen, was that the only day he worked with you, the day in question?

A. That's right, as far as I remember.

Q. Thereafter, outside of that only day that he worked with you, you never had any conversations with him from the time that he worked with you up to the time you all

left the ship, during the fit-up or getting the vessel ready for navigation, you never talked to him at all, did you?

A. No, sir.

Q. So, therefore, when you say he never talked to you or said anything to you, you are putting it just to one day he worked with you.

Mr. Ray: Wait a minute, I object.

The Court: You have no right to summarize things for the jury until you come to argue it. That question is stricken.

Q. Can you tell me where the lights were in the pumproom?

A. Yes, sir, I can.

Q. Where were they?

A. There is two down there, one over each turbine pump, and then there is one in the center over the ballast pump, and two up in the ceiling.

Q. When you are talking about these electric lights coming through the dead-lights which are in the engine-room and firehold, they are not in the pumproom?

A. There are two overhead.

Q. Would you say those lights overhead were 27 feet away from where you were standing?

A. No, sir.

Q. How many feet would you say they were away?

A. They may be 20 feet.

Q. Would the 20 feet be from the cat-walk?

A. From the top of the cat-walk.

Q. 20 feet?

A. Yes.

[fol. 80] Q. How do you know that?

A. Because the tank, up to the top of the deck is supposed to be 27 feet, but by the pump there they have a double bottom underneath, and that is about three feet, maybe two and a half or three feet, then you have four feet up to the cat-walk.

Q. Do you know whether those lights were 100 volts apiece?

A. It is 120 watts.

Q. 120-watt bulb?

A. Yes; that is the two overhead.

Q. They were 20 feet away from the pumps, is that right?

A. That's right.

Q. On the day in question were you using a portable extension light?

A. There is a portable extension down in the pumproom.

Q. Were you using that on your pump?

A. I don't think so.

Q. Who was using it?

A. They have that hanging in the middle of the pumproom down there.

Q. On that particular day was it over your pump or in the middle?

A. In the middle of the pumproom.

Q. Where did it come out to?

A. Up on deck.

Q. Who put it in the middle of the pumproom?

A. I did.

Q. Handing you Defendant's Exhibit C, kindly indicate where that portable extension cord light hung.

A. I can't see it here. It is farther this way.

Q. Would you be kind enough to indicate on Defendant's Exhibit A where it was?

A. I can't tell it here either.

Q. Handing you Defendant's Exhibit B can you tell it from that picture?

A. No.

Q. Now, can you tell us—

A. It is in between here.

Q. Can you tell us where was the light, was it forward or aft of the cat-walk?

A. I would say it was aft of the cat-walk.

Q. Where was it rigged on, what portion of the pumproom was that extension cord rigged on?

A. Around where that bilge pump is, in the middle of the pumproom there.

[fol. 81] Q. How high was it hanging over the cat-walk?

A. Oh, I would say two or three feet.

Q. Now, can you tell us how that gave illumination down, using Exhibit B, can you tell us how that gave any illumination to your work?

A. I had it hanging over here. It would shine over there.

Q. What wattage was that bulb?

A. 200 watts—150 or 200.

Q. Do you know exactly?

A. I would say 150 at least.

Q. You are just guessing?

A. No, sir.

Q. Did you ever put a bulb in there?

A. I put that in myself.

Q. Do you recall what wattage that bulb was?

A. 150.

Q. Now, when a man working down in here, with the cat-walk here, how did that light reflect over that cat-walk down into that pit?

A. I don't know what you are trying to get to.

Q. I am just asking the question. How did that light reflect over the cat-walk down into the pit?

A. It is up high, only thing I can tell you.

Q. How can it get past the cat-walk?

A. Because it is on top of the cat-walk, hanging up on a piece of pipe.

Q. How high above the cat-walk?

A. About three feet.

Q. It was aft of the cat-walk?

A. Aft of the cat-walk.

Q. Can you tell us how the light shown down in the pit?

A. It would be shining down here.

Q. Doesn't it shine on this end of the cat-walk?

A. It gets all around.

Q. Any work you and Mr. Michalic did was pursuant to orders, isn't that true?

A. Yes, that's true.

Q. Any time while you were on the vessel around April 1st, 1956, were you told about Michalic's accident?

Mr. Ray: If the Court please, I object.

The Court: Sustained.

[fol. 82] Q. You have referred to these tools as being an alloy. Were some of those tools made out of steel?

A. No, sir. They are not allowed to have steel down in the pumproom.

Q. What is the alloy they use in there?

A. I don't know what it is made out of. It is spark-proof, that's all I know. That's the Coast Guard regulation.

Q. What about the spectacle wrenches, were they made out of steel?

A. What are they, is that some other kind of wrench?

Q. They are used for this work, aren't they?

Mr. Ray: I object to that. There is no evidence of that.

The Court: Let me ask you, please, you are the one who asked for a separation of witnesses. You keep going back to one of your witnesses in the room. Please discontinue that.

Q. You said he worked on the port centrifugal pump. Are you sure that he worked on that one or the starboard one?

A. Well, I am not sure about that. I know I didn't work on the same pump.

Q. But you testified in direct examination that he worked on the port pump and you worked on the starboard pump. Are you sure of that?

A. As far as I remember that's right.

Q. These pictures were introduced in evidence. Do you see the port pump in these pictures?

A. This is the port pump here (indicating on Exhibit C). This is the starboard, and this is starboard (indicating Exhibits A and B).

Q. This particular wrench that you handed Michalic, can you tell us how long that wrench had remained in the tool box before you had given that wrench to Michalic?

A. How long had that been in the tool box—you mean that day?

[fol. 83] Q. No, without being used.

A. I would say about nine months.

Q. Therefore, no one had looked at it for nine months up to that particular day, is that right?

A. It could be, yes.

Mr. Sampliner: That's all.

Mr. Ray: No further questions.

The Court: How often a year do you use this wrench?

The Witness: Once a year.

The Court: So you bought a new set of tools five years before and you used these wrenches five times in five years?

The Witness: That's right.

Mr. Ray: If the Court please, the defendant rests, and I desire to again renew our motion.

RENEWAL OF DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. Ray: I am prepared, if the Court please, if the Court desires it, to outline the proof in this case to support the defendant's motion for a directed verdict. I will defer to the Court's wishes in that connection.

The Court: I suggest you argue it in full, take all the time you need on both sides.

Mr. Ray: If the Court please, the complaint in this case alleges that "some time during the month of December, 1955, on a day certain, within the knowledge of the defendant, and while the vessel at all times mentioned herein was upon the waters of Lake Erie, berthed at her dock in the Port of Cleveland, Ohio, and while in the pursuance of his duties under peremptory orders and exercising due care and caution for his own safety, the First Assistant Engineer before noon ordered the plaintiff to assist the pumpman in the pumproom, and while in the process of taking off the nuts on the pump, while using a heavy wrench, suddenly and unexpectedly the wrench slipped off the nut [fol. 84] and fell several feet and violently and forcibly struck the large toe on his left foot."

They further allege that the plaintiff "was ordered to perform said work in close quarters, using an old defective wrench in an unseaworthy condition in that the teeth and grip of the wrench were worn and defective."

And this is what I want to bring to the Court's attention with respect to the plaintiff's Paragraph 5: "Plaintiff says that as a result thereof, he sustained severe and painful injuries, necessitating an amputation of his left foot below the knee."

Now, it is of no consequence that the proof in this case reflects the amputation is in fact above the knee, the thing that is important in that connection, and I intend to advert

to that in more detail later on in my argument, is that this is not a case in which aggravation is claimed; it is a case in which, from a medical standpoint, they allege and they were required to prove, if the Court please, from the standpoint of causal relationship, that the negligence of the defendant, the alleged negligence of the defendant, was the direct and proximate cause of the amputation. So we do not have an aggravation case here.

Now, the situation relating to the pumproom on the Orion is, we believe, substantially this: that on the day in question—and frankly, I was amazed to hear testimony which was subsequently stricken by the Court—perhaps I should not even allude to it—but the statement was made an arbitrary date was selected as the date when this accident occurred. Now, predicated upon the testimony that came from the plaintiff himself, I think we have to assume that an accident did occur and that that date was December 28, 1955. It is undisputed that the First Assistant Engineer gave orders to the pumpman to have the casings removed from the two centrifugal pumps, and that the pumpman was told that he would have help in doing that work. [fol. 85] Mr. Michalic did in fact go into the pumproom and assist in taking off the nuts that held down the casing of the pump. I don't think it is important one way or the other whether it was the starboard pump or port pump. It is undisputed both pumps are of the same type, have the same number of bolts and nuts, and it is also undisputed that an open face wrench was used by Michalic to take the nuts off and that he would use a mallet. Michalic himself testified in connection with the taking off of the nuts that he had taken off all but five of the nuts, and in response to a question by the Court, he said he assumed that there were about 20 of those nuts, so he had taken off 15 or 16 by the time the accident occurred.

I guess no one will know absolutely why the wrench dropped, if it did drop. I suggest a plausible explanation, if we are even permitted to speculate, that it could easily have happened if he hit the wrench with a particularly hard blow, it might be that caused the wrench to fly off the nut. In the light of the other testimony in the case, I say there is a substantial question in my mind, and I would think in the

jury's mind whether the accident even occurred, because with a case history of Buerger's Disease it would seem reasonable and plausible that had that wrench been dropped upon Michalic's toe, first of all the blow would have been very severe and there would have been an immediate bruising; and seamen, as a class, some of them are stoic and some aren't, but I would believe in this situation where had this type of accident occurred, certainly someone on that vessel would have known about it before the next Spring.

So we start in this case with what is known on the vessel as an unreported case. In other words, there is no report made to the officers, no accident report is made, so the owner has no notice of the accident until the man's toe reaches a condition where medical treatment is imperative, and then he goes to the First Mate and the Master in con- [fol. 86] nection, I assume, with his application for a hospital ticket. He then tells them back somewhere, some time in December, 1955, while he was working on the pump, he dropped the wrench.

Now, I say to your Honor, considering the story as told by the plaintiff himself, there is a complete absence of negligence.

We are still of the view that the simple tool doctrine applies in this situation. Even if the simple tool doctrine does not apply we say the overwhelming proof in this case is that the tools were examined by the man in charge of them; that he has said the tool he gave to the plaintiff was in good condition; he has said the three wrenches used in the pumproom were purchased five years before that; and both he and the First Assistant Engineer said those wrenches are used solely for that job, are only used once a year, they are used in the lay-up to help remove the casing and they are used when the fit-out starts the next year when the casings are put back on the pump. And it is uncontradicted that those wrenches are made of an alloy so that they are spark-proof, and I would say that reasonable men could not disagree, in the light of the proof in this case, on the condition of those tools as to whether or not they were in good condition. The only person who has testified to the contrary is the plaintiff himself and he, obviously, has a stake in this lawsuit.

Before I leave that point, your Honor, the type of work that was being done was such that, assuming again that the accident occurred, it is the type of accident that may occur where there was an entire absence of negligence or unseaworthiness. In other words, you might hit the handle of that wrench with that mallet with such a blow it could fly out. In other words, it could be absolutely 100 percent perfect, the nut could be in perfect condition, the bolt could be in perfect condition, and if he didn't have hold of it firmly or if he hit it an extra hard blow the nut [fol. 87] could fly out. It is not the type of accident which would hold within it the factors or ingredients of negligence.

Now, I presume in the light of that, it is not too necessary to argue the matter of proximate cause, but there, again, I think there is a failure of proof, that the plaintiff hasn't sustained the burden of proof. All of the doctors who testified here testified, and were in agreement on this proposition that Buerger's Disease is a disease that no one knows the origin of, that there is no cure for, that it is a disease that has progressive stages, that the continuation of smoking has a definite effect on the ability to arrest it, and, if you will recall, Dr. Bright said unless this man stops smoking entirely why the chances are that he could have additional trouble with his other leg. The doctors called by the plaintiff testified that in their opinion that was a causal relation between the trauma which was sustained and the amputation, but all three of them had to admit that with Buerger's Disease you might have amputation without trauma, and Dr. Bright, who has had more experience in this particular field than all three of the doctors together called by the plaintiff, testified that in his opinion although the trauma might have speeded up the necessity of an amputation that as far as he was concerned it was simply an accident. If this man had stopped smoking in 1951 he would still have his leg today. And the proof which the plaintiff introduced through his witnesses, medical witnesses, with respect to the flaring up of the matter, has no relevancy in this case at all, because the plaintiff doesn't seek to recover for a flaring up of a pre-existing condition. He must base his right to recovery

upon negligence of the defendant being the direct and proximate cause of the amputation.

At the end of the plaintiff's case I discussed the ruling of the Supreme Court in the Jacob v. New York, and will not again refer to that at this time, but I do want to direct the Court's attention, first of all, to the language, and I [fol. 88] am now referring to the application of the simple tool doctrine, the holding of the Circuit Court of Appeals, Fourth Circuit, Newbern v. Great Atlantic & Pacific Tea Company, in which Judge Parker, speaking for that Court, reading from Page 525, says:

> "It is well settled that, while it is the duty of the master, in exercise of reasonable care for the safety of the employees, to see that machinery and appliances which may cause injury to him are in reasonably safe condition, this duty does not ordinarily exist with respect to simple tools from the use of which no danger is reasonably to be apprehended or as to which the employee is in a better position than the master to discover defects."

In connection with that I would suggest when Mr. Michalic took that tool from the pumproom he had an obligation at that time to examine it and if the wrench was defective in any way it was his obligation to bring it to the attention of the pumpman, and if the pumpman was unwilling to do anything about it, to bring it to the attention of the First Assistant Engineer who was the responsible officer on board. Now, that was not done. The Court goes on to say, after citing seven or eight cases in support of the principle I have just talked about, the Court goes on to say this:

> "This is true, not because the employee assumes the risk of injury from defects in such tools, but because the possibility of injury is so remote as not to impose upon the master the duty of seeing that they are free from defects in the first instance or of inspecting them thereafter. The fact that the employee has better opportunity than the master to judge of the defects [fol. 89] of such tools, that no inspection is necessary

to discover such defects, and that no danger is to be apprehended which the employee cannot guard himself against, renders it unnecessary in ordinary cases that the Master exercise with respect to simple tools the care that the law requires with respect to more complicated machinery."

I will say to your Honor that in the decision of the Supreme Court in Jacob vs. New York, that doctrine I have just read to you is left untouched.

The other case that the Supreme Court refers to in the Jacob vs. New York decision is the case of O'Hara vs. Brown Hoisting Machinery Company, Circuit Court of Appeals, Third Circuit, 171 Fed. 394. The District Judge writing the opinion says this with respect to the duty required as to simple tools, I am reading from Page 396: "A mere imperfection in an implement or tool furnished by a master by reason of which bodily injury results to his servant does not necessarily import actionable negligence on the part of the former. One of the duties of a master is to exercise reasonable care and circumspection to provide reasonably safe tools and implements to be used by his servants, and he owes this duty not only to those of his servants who are to use them, but equally to other servants in close proximity to those by whom they are to be used. But the master is not an insurer either of the absolute safety or reasonable safety of tools furnished by him. The extent of the obligation resting on him in this connection is to exercise reasonable care and circumspection to provide reasonably safe tools and when he has done this he has fully performed his duty and cannot be held liable for the consequences of any undiscovered defects or imperfections in them."

Furthermore, the Court says: "The cases have established a limitation on the duty of the master to inspect tools [fol. 90] and implements used by his servants and to mend or repair the same with reasonable care. A distinction is drawn between common and ordinary tools used by ordinary workmen, who by the nature of their employment may fairly be considered competent to ascertain and remedy their defects resulting from use and wear, and tools of special con-

struction which for their maintenance in safe and proper condition require the attention of men skilled in the inspection and repair of similar appliances. To fasten on the master the duty of inspection with respect to such common and ordinary tools would place an undue and frequently insupportable burden on his shoulders, unreasonable to require and forbidden by the exigencies of business. The master is entitled to rely on the presumption that servants using such tools will seasonably discover defects of which the master has no knowledge or notice."

Now, that doctrine has been left untouched by the Supreme Court of the United States in the Jacob decision.

Now, with respect to the allegations of negligence that are not related to the wrench itself, as I told your Honor in the argument at the end of the plaintiff's case, the allegation with respect to the poor lighting and to confined quarters was graphically set at rest by the plaintiff himself when he testified that he had removed 16 of those nuts and that this accident occurred when only five remained. So it seems to be it is self-evident that he removed those nuts without any difficulty, and that the lighting must have been sufficient and the quarters were not too cramped.

We say, therefore, your Honor, that the vessel owner in this case has even gone beyond the requirements set forth in all the decisions as far as inspection is concerned. The proof is a proper tool was furnished by the plaintiff; and if the accident occurred, which we doubt because it was not reported for about four months, that it resulted from his own carelessness. That the great weight of the medical [fol. 91] testimony is that if instead of continuing work, which was the worst thing he could have done after the trauma to the toe occurred, if he had gotten medical treatment, and he more than anybody else should have known the necessity of that, having lived with that disease for four years, that the toe probably could have been saved and certainly there would not have been any amputation of his leg required.

In the light of all those things we believe there is not any evidence of negligence upon which reasonable minds can disagree and that the plaintiff has failed in establishing, even if the negligence of the defendant existed, that there

is a causal relation between the alleged negligence and the injury which he sustained, and we believe, therefore, that the Court should instruct the jury to return a verdict for the defendant on the first cause of action.

* * * * * * *

Mr. Sampliner: If your Honor please, there have been two important cases decided by the United States Supreme Court. The first case that I am going to talk about is the Rogers vs. Missouri Pacific Railroad Company case which was argued November 7, 1956 and decided February 25, 1957, recorded in 352 U. S. 500:

"In an action in a Missouri state court under the Federal Employers' Liability Act, brought against respondent railroad by petitioner, who was injured in a fall from a culvert while working in a section gang burning weeds beside the track and watching a passing train for hot-boxes, the jury awarded damages to petitioner. The State Supreme Court reversed upon the ground that petitioner's evidence did not support the finding of respondent's liability. This court granted certiorari: Held: the evidence was sufficient to support the jury finding for petitioner, and the judgment is reversed.

The Supreme Court of the United States said: "Under the Federal Employers' Liability Act,"—and the Jones [fol. 92] Act follows that Act, 46 U. S. C.—"the test of a jury case is whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the employee's injury."

It went on to say:

"Cognizance of the duty to effectuate the intention of the Congress to secure the right to a jury determination in cases under the Act, this court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination."

Item 3: "The fact that Congress has not substituted a scheme of workmen's compensation cannot relieve this court of its obligation to effectuate the existing Act by granting certiorari to correct the improper administration

of the Act and to prevent its erosion by narrow and niggardly construction.

4. When this court has granted certiorari in a Federal Employers' Liability Act case, the litigants are entitled to the same measure of review on the merits as in every other case.

5. In actions under the Act, Congress has vested the power of decision exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot possibly differ whether fault of the employer played any part in the employee's injury."

Your Honor, the evidence in this case is evidence of divergent views. On one hand we have Michalic, the only other man in the pumproom, and the pumpman. Now, the pumpman's evidence is not to be considered any different than Michalic's, and consequently I say to your Honor that fair-minded jurors can honestly differ, and it is up to them to determine and not anybody else.

[fol. 93] Then Item 6 says: "Special and important reasons for the grant of certiorari in these cases exists when lower federal and state courts persistently deprive litigants of their right to a jury determination."

Your Honor, it seems to me in the case of Ferguson vs. Moore-McCormack Lines, in 352, the same volume, Page 521, the United States Supreme Court in that case, argued December 10, 1956, decided February 25, 1957, said as follows:

"Petitioner, an employee on a passenger ship of respondent, was injured in the course of his employment while using a sharp butcher knife to remove ice cream from a container in which it was frozen hard. In an action under the Jones Act, under which the standard of liability is that of the Federal Employers' Liability Act, the Federal District Court entered judgment on a jury verdict awarding damages to petitioner. The Court of Appeals reversed, holding that a motion for directed verdict for respondent should have been granted. This court granted certiorari. Held: There was sufficient evidence to take to the jury the question whether respondent was negligent in failing to

furnish petitioner an adequate tool with which to perform his task, and the judgment is reversed."

Now, your Honor, in this particular case I would like to read part of the opinion of Justice Douglas.

"Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a pre-eminent role in these Jones Act cases (Jacob vs. New York City, 315 U. S. 752; Schulz vs. Pennsylvania Railroad Company, 350 U. S. 23), could conclude that petitioner had been furnished no safe tool to perform his task. It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out [fol. 94] the ice cream. On this record, fair-minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him." They cite Schulz vs. Pennsylvania Railroad Co. "Since the standard of liability under the Jones Act is that established by Congress under the Federal Employers' Liability Act, what we said in Rogers vs. Missouri Pacific Railroad Co., ante, p. 500 decided this day, is relevant here: 'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'"

I emphasize "played any part, even the slightest." I again emphasize "even the slightest, in producing the injury or death for which damages are sought."

Now, in the famous case of Jacob vs. New York City, which was the case where the plaintiff suffered a fall caused by the use of a defective wrench, I again repeat what the Court said on Page 752:

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen,

whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." In this case, it went on, the jury is to consider whether injury was caused by any defect due to respondent's negligence.

Now, your Honor, on Pages 97 and 98 of the court reporter's notebook in this case we find the evidence that Michalic complained. In the Jacob case we find the petitioner inspected the wrench and found it defective and asked the Chief Engineer for a new wrench three times. I say, what difference does it make if he protested once or three times? The Court in that case said it was for the [fol. 95] jury to say whether respondent's failure to comply with the repeated request was negligence on its part.

Now, your Honor, we go to the pleadings which have been referred to in this case.

December 28, 1955 has been stated or alleged to be the date of the accident. Although it could mention the exact date—I do not have that handy decision, but I do know of other instances under the Federal Rules of Civil Procedure, where we use what is known as the short form, I would say the most abbreviated form, which means it must give a notification to the opposition of the claim. The one phase that is important is the fact that there must be a notification, and the important thing is whether or not the defendant has been apprised of what we contend. Now, in this case the Steamship Company filed an amended answer, and they found out certain things in the taking of depositions and otherwise, and they were so permitted by leave of court, so they cannot claim any element of surprise. A deposition was taken of the plaintiff, and they were apprised of all the conditions which we have pleaded.

Mr. Ray: We claim no surprise. I will concede that, if Mr. Sampliner wants to go on to another matter.

Mr. Sampliner: Therefore, we get down to the one thing, are we going to say in this court that the Supreme Court of the United States is not to be regarded, by reason of the decisions in the Rogers case and the Ferguson case? I say to you all we have here of any testimony is absolutely one against the other—the seaman who is without his leg, and on the other hand the pumpman who has worked 12

years on the same vessel, the Orion. On one hand we have Michalic saying that this is what happened, and this is the type of tool, and this is the place afforded me to work.

Now, your Honor, I say to you that I have elicited from these two witnesses of the defense that an order was carried out, a peremptory order was given.

[fol. 96] Now, I direct your Honor's attention to the cases cited in our brief, and among them—

Darlington vs. National Bulk Carriers, 152 Fed. (2d) 817; Dayton vs. Midland S.S. Lines, Inc., 110 Fed. Supp. 418; Schucker vs. United States, A. M. C. 1192 (S. D. N. Y.); Hanson vs. Luckenbach S.S. Co., 65 Fed. (2d) 457; Kangadis vs. United States, 121 Fed. Supp. 842; Jaarkolski vs. Groves, 84 Fed. Supp. 493.

Now, your Honor, there are four items of negligence in this case—well, I should say five. First of all, the plaintiff acted under peremptory orders; second, ordered into an area the jury can determine whether or not a dangerous area, whether it was adequate and safe, according to the exhibits, whether there was sufficient illumination. We have one man saying these tools were used only once a year. That is for the jury to determine whether they were, or reasonable minds could differ. On one hand Michalic says the tool was chewed and worn off, that one particular tool; on the other hand the pumpman, Mr. Hanson, says it was in perfect condition. Next, your Honor, there has been a complaint about the wrench, as shown from Pages 97 and 98 of the reporter's notes. Another point is, did the defective tool create an unseaworthy condition, and that is liability, almost ipso facto.

Now, your Honor, the four or five points which I have mentioned are questions absolutely for the jury, and since reasonable minds will differ they are the only ones who can decide those questions.

* * * * * * *

We believe that under the authority of the Supreme Court in the cases we have cited, this case must go to the jury, and on the point of maintenance and cure, where we have diversity of citizenship here and a case for a jury

determination I leave the matter for your earnest consideration.

[fol. 97] Mr. Ray: As far as the question of diversity, I don't think that is at issue, if the Court please.

Oral Opinion on Defendant's Renewed Motion for Directed Verdict

The Court: Let me start where Mr. Sampliner left off. It is true when you were asking questions of the prosthesis man from Detroit we sustained objections because you asked a variety of questions which were improper. Had you asked the question of the cost it would have been admitted, should have been admitted. You never made any effort to ask that, but I assume whatever the bill is you have got it and there is no question on its mere presentation it will be accepted.

This has been a case which has caused us some worry in some respects, particularly as we look forward to what appear to be the prospective proximate causes with which the jury might have been concerned, if the jury was going to be concerned. We have the original possible proximate cause that the man's condition could have been caused had he had the condition back in '48. The jury might well have found that the leg would have come off anyway because of the condition, or there could have been an aggravation of the condition caused by the man's own conduct, in that he never abated the smoking habit until very, very recently, and then not completely. In other words, for whatever reason, he would not give up smoking, knowing it was the most dangerous thing in the world for him. That was the second possible proximate cause.

Then you have the possible cause of trauma here, if trauma would have been found by the jury to have hastened what happened. But at no time was any medical man asked any opinion as to the degree to which it would have been hastened, and the jury, if they would have gotten the case, would have no information to go on other than the fact it was hastened.

Of course, there was always the fourth possibility that the jury might say a man with such a history, such a terrible

illness, and it is a terrible illness, why the Lord permits it [fol. 98] is His business, no one seems to know what starts it, there was a possibility a jury would figure a man who would have such an illness would have run and reported it the minute he hurt himself, knowing the prospect he had of a very serious injury as the result of a very serious injury to himself for which his employer was in no way responsible. The fact he didn't report it for some months might be considered as some evidence by the jury he was never hurt in the way in which he says.

This business of Buerger's Disease has reached the point where there is quite a bit of elucidation about it. The man had numbness in his leg in 1949, he had a sympathectomy in 1951; hit the same toe with a fire brick in '51 or '52; never stopped smoking. Then we had the experts who really told us about this amputation business, as far as they are concerned. Dr. Bright said out of a 150 to 170 cases 15 percent of those who wouldn't quit smoking lost their foot. Dr. Silbert in New York was reported to have said, and he is apparently the highest authority in their specialty, that out of 436 cases that stopped smoking he avoided amputation.

Now, then, the petition set up the claim with reference to what was wrong with the wrench—"using an old defective wrench in an unseaworthy condition in that the teeth and grip of the wrench were worn and defective". Never, from one end of the lawsuit to the other, has the word "teeth" been used of that wrench. There has never been one mention of the fact the teeth were worn. Never has there been a mention of the fact the grip was worn, not one iota of testimony. And after I called this to the attention of all counsel on motion at the end of the plaintiff's case, the plaintiff's counsel sought to rehabilitate himself on the wrench with the cross-examination of defense witnesses, and successfully proved the wrench had no teeth. As a matter of fact on that type of wrench there are no teeth, so there is no iota of evidence the teeth had been [fol. 99] worn and no iota of evidence that the grip was worn, and the grip has not been mentioned from the time of the lawsuit to this minute.

So the plaintiff has proved no part of his contention with reference to defect; and the defect in the wrench is the foundation of the plaintiff's claim here.

I know the plaintiff mentioned the fact the wrench wasn't any good. The pumpman says they never discussed any such thing. Now, as Mr. Sampliner says, what the pumpman said could be considered by the jury, as between what two witnesses say, one of whom was working for the defendant, should it get that far. The pumpman say "this is a tool I bought five years ago and there are three of these on this ship"; they are used for only one purpose once a year; "we use them to take the nuts off the pump head casing; and having been used just five times in five years there is absolutely nothing wrong with the wrenches." Should a jury be called upon to decide as to which of the two contending witnesses was right, when the plaintiff had only testified there was some defect in the wrench, and he starts out on the theory the teeth are worn, and there are no teeth, and he starts out on the theory the grip is worn, and there is never any mention of the grip in the case until I mentioned it right now?

For authority they tell me what the Supreme Court has required. That's why we checked the case Mr. Sampliner mentioned, and I called counsel's attention to it after plaintiff's case was completed, because of the detailed description there given of that wrench which was considered to be improper, and in that case there is given quite a bit of description about the wrench, what it would do and what it would not do, and why it slipped. We do not have that here. All we have here is the conclusion of the plaintiff, the conclusion it is defective, it is worn, it is an old wrench, chewed-up wrench. Nowhere in this case is there anything [fol. 100] on which this jury could ever be called upon to decide to what degree the teeth had been worn and to what degree the grip had been worn because neither the teeth nor grip have been mentioned since the time the lawsuit began.

Now, in the Jacob case, as I said before, it was a case where the Court said it was a close question, a closely-decided case, because as I said before three of the Judges of the top court were on one side of the fence and three on the other and they were evenly divided. They go on to say

what the jury might have been called upon to have decided. That is to say, it was for the jury to decide whether a monkey wrench was a reasonable safe and suitable tool. It was said that if he hadn't liked the wrench he used, he could have used another wrench, so the Court said the jury should have decided whether a monkey wrench or a prospectively substituted wrench should have been used, and whether it was reasonably safe for the work in hand. Next there was a question whether the respondent's failure, when it had two or possibly three weeks to supply the petitioner with a new wrench, amounted to negligence. That man had complained about the wrench in the three weeks three times, and he had to use it every time the boat made a trip across the river, and it was crossing the river all the time, and each day he had to take nuts off some part and put them back.

We have no such situation here. So, actually, what they said there was that the case should have gone to the jury on the ground whether the ship company was negligent for having failed for a period of three weeks to get the man another wrench.

Here we have no proof of defect. We have a conclusion about an alleged defect. And the question that we must also then consider is if the jury has nothing to go on but the conclusions of this plaintiff, then must we submit the case to them? A man takes the stand and says, "I had a [fol. 101] tool which was defective". Period. That's what this man said. He has come to the conclusion which only the jury is allowed to reach. Now, must they be given the case to decide whether or not they will accept his conclusion, when they are not given evidence of the facts on which his conclusion is based?

I think the obvious answer to that is it simply cannot be done.

Now, let's get down to his work. At one point in the case it was stated there were 35 or 40 nuts to be handled, another point 25, and another point 20; and another point it was said he had taken off all but four or five or six or seven nuts. In any event the tool seemed to do very well up to a point where something happened. He demonstrated how he hit this so-called grip of the wrench—he never used the

word grip, I used it—with the hammer, holding it in the left hand and striking down with the right. I don't know whether he was tightening the nut or not, but it looked like he was. It has been suggested maybe he hit it too hard. I do not know. All I know is what the evidence has shown, that it had a smooth jaw. That was brought out on cross-examination by plaintiff's counsel, when plaintiff's counsel did seek to rehabilitate his case because at the end of plaintiff's case I had suggested that there was no proof, in accordance with the petition, with reference to the claim set up. So plaintiff's counsel, and very properly so, that is his privilege and his right and duty, was trying to show if he could on defendant's proof he had a case, and the only evidence he elicited was that it was a smooth wrench.

Now, it is claimed by the complaint that this was a worn tool. The proof was that it had been used five times. The claim is it was defective, and beyond using the word, there is no proof wherein it was defective, no proof the teeth were worn, for it had no teeth, and no proof its grip was worn because grip was never mentioned until I decided to talk about it here. None of the allegations set forth in the [fol. 102] petition are proven, and no effort to correct or amend the petition, and no suggestion a mistake had been made and there was something else wrong with it.

Incidentally, while I put it on the record, it is really off the record, I asked counsel three or four times in pre-trial wherein this thing was defective, and all the answer I was ever able to get was that it would come out in the lawsuit, and the answer that it would come out in the lawsuit is no answer at all.

So this gentleman either got 15 nuts out of 20 or he got 34 out of 40, either way, he wasn't doing too bad a job with the wrench, and it is probably no wonder because the wrench had been used on five other occasions and probably was in splendid shape.

It, finally, does not have the defects claimed and no other defects are suggested. What could the jury be called upon to determine with reference to the wrench? Wherein can reasonable minds differ on what we have here? What defect has plaintiff talked about concerning which the jury could be called upon to judge whether there is a defect

there or not? Is it that the teeth are worn, when there are no teeth? Or that the grip is worn, when the grip has never been mentioned? Or am I required to hand to the jury just a conclusion of a plaintiff, who of course has an interest in the case, which is understandable, but who merely says, "It is worn. It is defective. It is chewed up. And for that I want $350,000".

A man has been carrying a defect, and it is too bad he does, for some eight or nine years, or longer for all we know. He is very conscious of it. He had been operated on to stop the pain, cutting the nerves to stop the pain. The condition goes on.. But the point is, I suppose to a degree he could have had this same thing happening in another way. He could have got it on another ship he was on, or perhaps got it on no ship, but he is the only one to decide that, the only one who should decide it.

[fol. 103] I would assume the highly-specialized counsel in the Court Room learned quite a bit about Buerger's Disease in this lawsuit as I did, and everybody else listening to the doctors. There is not much disagreement about this.

He washed the foot, he did nothing to stop smoking except very recently, to prevent aggravation of that condition which has been going on since 1948. He could have got it if he never hit his foot, of course we don't know if he hit his foot, nobody knows but him. There is always the possibility if he did hit his foot he would have reported it instantly, because no one knew better than him the implication, the future he had immediately on hurting himself, if he hurt himself. The fact that he didn't report it, kind of militates against his claim that he did hurt himself.

Much is said about the lights here. Since plaintiff said he had no difficulty in seeing the nuts when he took them off, I don't think the lights are involved in the case at all.

Counsel in his last discussion talked about how cramped the space was. Well, we have seen the photographs. It is not cramped to the point where he couldn't get at the casing; the other man got to his.

Counsel for plaintiff suggests, oh, he wasn't used to this, he was a fireman. Sure he is, but the testimony seemed to be part of the job when they lay-up and fit-out was to do the very work around this pump they were doing. Of

course, he couldn't have had much experience doing it, nor would he need much. He was around the ship a few years and once a year they did the work, which is the reason why the wrench probably wasn't worn at all, probably was just as smooth as his immediate superior related. He said there were no worn places, it was in good condition, and that the plaintiff never complained to him about it. He testified that he had three wrenches all of the same size, all three good, they weren't chipped. He checked them when they came out of the tool chest, and he was cross-examined when he checked them, but he said nine months before, [fol. 104] meaning they hadn't had to look at them since they put them away, there was no reason to look at them, meaning it was about as unused a tool as there was on the ship, because once a year they got it out for these 30 or 40 nuts. Pretty much as you would remove a tire when you get a flat and have to take off a half a dozen nuts. You don't wear out your nuts or bolts; you don't wear out wrenches using them once a year for five years.

I will say again, gentlemen, I don't see anything here on which reasonable men could differ. So I find not one iota of evidence on the claims set forth in the complaint, which has never been modified, changed or amended at any time or any claim suggested that it be so amended.

I see no reason for discussing the simple tool doctrine. I do not think in the Jacob case the Supreme Court intended to abrogate it and so it has no application. I am not called upon so to say. My question is, is there any evidence concerning which reasonable minds on a jury might differ? No negligence has been offered for the consideration of this jury in the form of such defects in this tool as have been complained of throughout this case, and reasonable minds could not honestly differ as to whether the teeth in the wrench were worn when there are no teeth in the wrench. and reasonable minds could not honestly differ as to whether the grip is worn, when the grip isn't mentioned from the time the case began until I mentioned it in this little discussion.

Since there is no proof in this case I grant the motion here.

Mr. Sampliner: We note an exception here and we will appeal.

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[fol. 105]

IN UNITED STATES DISTRICT COURT

ORDER—February 27, 1958

In conformity with Rule 77(d) of the Federal Rules of Civil Procedure please take notice that the following order or judgment was entered on Feb. 27, 1958. C. B. Watkins, Clerk, U. S. District Court, Northern District of Ohio.

Upon a verdict of the jury, by direction of the court, finding for the defendant on the first cause of action, and for the plaintiff on the second cause of action, for maintenance and cure, in the sum of $2,610.00,

It Is Ordered that the first cause of action is hereby dismissed.

Further, It Is Ordered that plaintiff recover from the defendant, on the second cause of action, the sum of $2,610.00 and costs, for maintenance and cure.

C. B. Watkins, Clerk.

[fols. 113-114]

IN UNITED STATES COURT OF APPEALS

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
February 23, 1959

(omitted in printing)

[fol. 115] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13,580

THOMAS S. MICHALIC, Plaintiff-Appellant,

—v.—

CLEVELAND TANKERS, INC., Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

OPINION—Decided October 29, 1959

Before Simons and Allen, Circuit Judges, and O'Sullivan, District Judge.

PER CURIAM:

This action by a seaman, under the Jones Act (Title 46, U. S. C. A., Section 688), concluded by the District Judge's direction to a jury to return a verdict of no cause of action. The propriety of such direction is the matter here for review.

For some years prior to December 28, 1955, plaintiff had been suffering from Buerger's disease. In 1951 he was hospitalized from an injury consequent upon dropping a sack of cement on his foot, although which foot was not disclosed. In 1952 he was again hospitalized and he then

learned that he was suffering from Buerger's disease in his left foot. Some surgery, including the cutting of a nerve in his back, was performed for the purpose of relieving pain which he was then suffering in his left leg.

He claims that on or about December 28, 1955, while using a wrench to remove nuts on a pump housing on defendant's vessel, the wrench, when he struck it with a mallet, slipped and fell, striking the big toe in his left foot. Without interruption, he continued working on the [fol. 116] vessel until the conclusion of the lay-up in January, 1956. He rejoined the vessel on March 15, 1956. Plaintiff testified that after a few trips on the boat his leg became so bad he could no longer stand it. He then told his superior officers he wished to get off the boat and asked for a hospital ticket. This was on April 1, 1956. He then, for the first time, told of the claimed incident of the dropping of the wrench. Until then he had told no one of the incident, although he testified that his toe had begun to bother him immediately following the occurrence, requiring him to bathe it rather continuously while on the boat and after the season of navigation while ashore. He did not tell of the accident to the pumpman who had been working with him in the pumproom on the day it occurred. He said he did mention it to a couple of deckhands. Upon receipt of the hospital ticket he went to a Marine Hospital where several amputations were performed, the final one resulting in the amputation of his leg above the knee.

Plaintiff's complaint charged that the vessel and its equipment were unseaworthy and that the defendant was negligent. Aside from some general conclusionary allegations of negligence and unseaworthiness, his specific charges upon which he relied for a cause of action consisted of assertions—

That the defendant did not provide a safe place or way to work; that defendant provided him with a defective wrench, knowing that, "the teeth of the wrench would not hold or be secure"; that defendant ordered and permitted him to work in close quarters; that defendant should have known of a defective condition of the teeth of the wrench; that defendant failed to provide him with a proper and secure wrench which would not loosen when average pres-

sure would be applied; that defendant failed to provide adequate, proper and seaworthy and safe appliances, to wit: a proper wrench without worn teeth; that defendant failed to maintain a proper lookout for the plaintiff, and failed to supervise the removal of the nuts off the pump, and to replace a defective, old and unseaworthy wrench; that defendant failed to provide plaintiff with skillful, careful and competent co-employees.

On the trial it was disclosed, without dispute, that the wrench being used by plaintiff did not have any teeth in it, but was an open-end wrench, with a jaw opening of about 1⅝ inches, approximately 12 inches long and weigh-
[fol. 117] ing 2½ pounds. It was made of spark-proof alloy metal. Plaintiff was also provided with a metal mallet for the purpose of striking the wrench in the process of loosening the nuts.

On this review, we accept plaintiff's proofs as true and in their most favorable light. Plaintiff and a fellow workman described the condition of the tools with which he was working variously as follows:

"It was a big wrench, old, beat up wrench."
"An old lead mallet they used in the pumproom."
"It was an old wrench, all chewed up on the end."

He testified he told the pumpman:

"This tool is not very good, kind of beat up. This wrench keeps slipping off."

The pumpman said:

"Never mind about that, do the job the best you can."

A former Mate and Captain of the vessel who had been discharged by defendant, described the tools being used in the pumproom in December, 1955, as being,

"in beaten and battered condition * * * they had been very beaten and battered."

Although plaintiff's pleadings made no charge of inadequate light or cramped quarters in the pumproom, the following testimony was received on these subjects:

As to illumination, plaintiff said, "to my estimation, it was poor, very poor."

"Q. Did they have any other electricity?

"A. No, sir, they only had shore lights that's all.

"Q. As far as the illumination in that room, what other illumination was there besides the portable light?

"A. Nothing, that's all we had, just the portable light.

"Q. And where was it hanging?

"A. The portable light was hanging over the pumpman's pump on the port side. He had a string tied to it and it was hanging right down beside his pump."

Referring to the portable light in the pumproom, he stated:

"I attempted to move it over to where I was, but it was too short, it wouldn't reach my pump at all."

"Q. Was there any light provided at the catwalk in that area at all, other than what you have described.

"A. No, sir."

Referring to the portholes between the engine room and pumproom, plaintiff said:

[fol. 118] "Those portholes were all dirty and greasy from grease flying around the pumproom."

A fellow workman testified in relation to the light:

"Well, the pumproom wasn't too large. It wasn't a large pumproom and the lighting wasn't too good. In fact, we had to use an extension cord."

The former Mate of the vessel, referring to the lighting in the pumproom, said:

"Very poor. In this lower level at all times it was necessary to use a flashlight in order to see anything in working on this grating level or below."

As to the cramped space in the pumproom, plaintiff testified:

"I was ordered to go into the pumproom. This is the catwalk going from one end of the ship, from the starboard to the port side * * *"

"Q. Now, did you have to get off the catwalk?

"A. Yes, sir. I had to get off that catwalk, and I had to crawl between four beams that hold the pump from vibrating, work underneath the catwalk.

"Q. As you were working there you stated you had to get between four beams. Can you describe them a little bit?

"A. Yes, I can. The four beams they help the pump. When the pump is pumping out cargo in a port, the four steel beams that come around the pump keep the pump from vibrating when they are pumping out.

"Q. What is the distance from the top of the pump to the catwalk where you had to go in there and work?

"A. About six inches.

"Q. Is that the area you had to work?

"A. Yes."

The above constitutes substantially all of the evidence relevant to the conditions in the pumproom and the condition of the tools with which plaintiff was working. There was no testimony in any way supporting a claim that the slipping or dropping of the wrench was brought about by, or related in any way to, the lighting conditions of the pumproom or to the smallness of the area. Plaintiff had actually removed all but five of an estimated total of twenty nuts before the wrench fell. He makes no claim that the progress of his work was in any way impaired or made more difficult by inadequate lighting or cramped quarters.

"Q. You had no difficulty seeing the bolts, did you?

"A. No, sir."

[fol. 119] Plaintiff's description of the accident is as follows:

"Q. What happened after you took off the bolts and nuts?

"A. After I started taking the bolts off with the old wrench, only about three or four more to get loose, a couple of them, I had hold of a nut * * * and I hit the wrench and it slipped off and it hit me on the foot at the big toe."

* * * * * * *

"Q. Now, when you were taking the bolts and nuts off, how many of those nuts had you taken off at the time the wrench slipped?

"A. I had them all off but about five or six.

"Q. You took those off without difficulty?

"A. I had a hard time loosening them off.

"Q. But you got them off?

"A. Yes.

"Q. In other words, you put the wrench on there and tapped it with the mallet and loosened them and then you turned the nuts off?

"A. I had a hard time taking them off.

"Q. But you took them off?

"A. Yes. The pumpman told me, 'Do the best you can'.

"Q. You got them off, and you got all but how many off at the time the accident occurred?

"A. About five.

"Q. And you were using the same wrench?

"A. The same wrench.

"Q. And the same mallet?

"A. Same mallet all the way through."

* * * * * * *

"Q. Did you become aware that this wrench as you have described, was getting worn as you were taking these nuts off?

"A. I told him about it, yes sir.

"Q. Did you go out and try to get another wrench out of the box?

"A. No, sir, he told me 'You do the best you can with that wrench right there.'

"Q. He told you not to use another wrench?

"A. He said, 'You do the best you can with that wrench right there'.

"Q. That's the only wrench you could use?

"A. The only wrench that I had to use."

* * * * * * *

"Q. Now, will you describe with as much particularity as you can just how the wrench slipped off the nut?

"A. Like I say, I had the wrench in my hand.

"Q. You were standing next to the pump?

"A. I was standing. I got hold over here, and I hit it with [fol. 120] the mallet and it slipped off the nut and came down the side of the pump and hit my big toe.

"Q. You hit the handle of the wrench with the mallet?

"A. Yes, she slipped off the nut on the pump and came down the side of the pump and smashed my big toe.

"Q. That's exactly the way you did it on all the others?

"A. I had to use the mallet on all the nuts, that's right. They were pretty tight.

"Q. In other words, you had gone through the same maneuver on the others as you had with this?

"A. Yes, sir.

"Q. Did you have any difficulty putting the wrench on the nuts before hitting it with the mallet?

"A. Yes, sir, they slipped.

"Q. What slipped?

"A. The wrench did."

• • • • • • •

"Q. I am talking about putting the wrench on the nuts. Did you have any difficulty putting the wrench on the nuts you took off?

"A. I told you the wrench was slipping off the nuts. It slipped off every one of them."

A fair reading of the District Judge's oral opinion given when granting the motion for a directed verdict, indicates his conclusion that there was no evidence from which the jury could make a finding of negligence or unseaworthiness. We concur in this conclusion and further express our opinion that there was a failure of proof as to any causal connection between the conditions which plaintiff complained of, namely, improper lighting, close quarters and improper tools, and the injury which he suffered.

Neither by accepting plaintiff's proofs in their most favorable light nor by drawing all legitimate inferences therefrom, can it be said that insufficient light or cramped working space had anything to do with the slipping of the wrench which was the immediate cause of the plaintiff's injury.

We come, then, to consideration of whether there was any evidence from which a jury could find that negligence

of the defendant or unseaworthiness of the vessel and equipment in any degree contributed to the slipping of the wrench and its falling upon the plaintiff's foot. The allegation of the complaint with reference to teeth of the wrench being worn was abandoned upon showing that it had no teeth, but was an open-end wrench. To say that a wrench is old, beaten, battered or chewed up gives no information as to whether or not the wrench was adequate [fol. 121] or inadequate to perform its function of loosening a nut. Neither do the above adjectives tell whether the grip of the wrench was in any way impaired or it was otherwise an unsafe tool. The plaintiff's evidence did not disclose what part of the wrench was beaten, battered or defective, except that it was "chewed up" on the end. There was no evidence of any improper design of the wrench or the mallet. The evidence discloses no claim or inference by plaintiff or his witnesses that the wrench slipped or fell because of any inadequate grip, nor that the wrench slipped or fell because the jaw of the wrench did not properly fit the nuts which were to be loosened by it. There was no evidence that the open or jaw end of the wrench was in any way deficient. We do not think merely stating that the wrench was beaten, battered, old, or chewed up is sufficient to allow an inference that it could not be used safely in the function for which it was designed. Evidence that the wrench was beaten, battered or chewed up, without other definition, was insufficient, in our opinion, to permit a jury to find that these thus described conditions, or any of them, were the cause of its slipping. The fact that the wrench slipped is not evidence that its slipping was the consequence of some condition in the jaw or handle of the wrench. There is no evidence from which it could be inferred that some condition described in the evidence contributed proximately as a cause of the slipping.

The recent cases of *Rogers* v. *Missouri Pacific Railway Co.*, 352 U. S. 500, and *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, relied upon by appellant, emphasize the jealousy with which today's courts guard the rights of injured workmen to have their causes submitted to a jury where there is any evidence, however slight, to justify a jury's factual finding of liability. The rule that the

plaintiff in such a case as this has the obligation to produce some evidence to prove, or permit a justifiable inference of, negligence and proximate cause is, however, still a part of our law. It is the function and duty of trial courts to determine whether or not in a particular case there is any evidence to justify the submission of a case to a jury.

In the case of *Ferguson* v. *Moore-McCormack*, supra, the Supreme Court affirmed the rule that the standard of liability under the Jones Act is the same as applied in [fol. 122] actions under the Federal Employers' Liability Act. In a case arising under the latter Act, the United States Supreme Court in the case of *Moore* v. *C. & O. Railway Co.*, 340 U. S. 573, 575, said:

"To recover under the Act, it was incumbent upon petitioner to prove negligence of respondent which caused the fatal accident."

We approve the ruling of the District Judge that the plaintiff in this case failed to provide any evidence from which a jury could find liability. It should be noted here that on his second cause of action for maintenance and cure, plaintiff recovered $2,610.00. No appeal was taken from that judgment.

The judgment of the District Court is affirmed.

[fol. 122A]

IN UNITED STATES COURT OF APPEALS

JUDGMENT—October 29, 1959

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 123] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 124]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1959

THOMAS MICHALIC, Petitioner,

—v.—

CLEVELAND TANKERS, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—January 28, 1960

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 28, 1960.

Potter Stewart, Associate Justice of the Supreme Court of the United States.

Dated this 28th day of January, 1960.

[fol. 125]

SUPREME COURT OF THE UNITED STATES

No. 666—October Term, 1959

THOMAS MICHALIC, Petitioner,

—v.—

CLEVELAND TANKERS, INC.

ORDER ALLOWING CERTIORARI—March 7, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Supreme Court of the United States

October Term, 1959

No. 660

THOMAS MICHAELS

Petitioner

v.

CLEVELAND TANKERS INC.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Cases Cited

Statutes Cited

Supreme Court of the United States

October Term, 1959

No. _____

THOMAS MICHALIC,

Petitioner,

against

CLEVELAND TANKERS INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled matter on October 29, 1959.

Opinions of the Courts Below

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, Honorable James C. Connell, in favor of respondent is unreported and is set out in the appendix to this petition at pages 11a to 18a.

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported to date, and is set out in the appendix to this petition at pages 1a to 10a.

Jurisdiction

This action, predicated upon the Jones Act, 46 U. S. C. § 688, and the doctrine of seaworthiness under the general maritime law, was brought in the United States District Court for the Northern District of Ohio, Eastern Division.

The order and judgment of dismissal was appealed from by petitioner.

The decision of the United States Court of Appeals for the Sixth Circuit, affirming the judgment of the lower Court, was filed on October 29, 1959.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Question Presented

Whether the Court below usurped the jury function in failing to review the evidence on a dismissal motion in a light most favorable to the plaintiff-petitioner by the simple expedient of emasculating the meaning of the clear, descriptive testimony given by the petitioner and witnesses.

Statute Involved

Jones Act, 46 U. S. C. § 688:

> "§ 688. Recovery for Injury to or Death of Seaman
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such

seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Statement of Facts

Thomas Michalic, the petitioner, 44 years old, had sailed on the Great Lakes for about four years (pp. 2, 3).[1] He joined the S.S. Orox as a fireman at Erie, Pennsylvania, in October, 1955 (3), had previously worked for the defendant for about three years (3), and was in good health and able to work (28, 193).

Michalic worked in the firehold, his duty was to keep the steam pressure up and to watch the water in the boilers (4).

In December, 1955, the vessel was in Cleveland for lay-up after the sailing season (5). At 8:00 o'clock A. M. while in the firehold (5), petitioner was ordered by the first assistant engineer (5, 206, 210), his superior officer (4), to assist Hansen, the pumpman, in the pumproom (5, 39). As a fireman, Michalic had never been in the pumproom (38) and knew nothing about the work (39).

In the pumproom, Hansen told Michalic to work on the starboard pump, to knock the nuts off the casing (cover) (212), and that he would work on the other one (6, 34). For the purpose, he gave petitioner "a big wrench, old beat-up wrench" (7) and "an old lead mallet" (8). The wrench was about a foot long "open end" and "all chewed up on the end" (8). Hansen then left Michalic to do other work (8, 213).

[1] Pages of the trial minutes.

Michalic had to leave the catwalk, which ran athwartship (7, 8), crawl forward between four beams holding the pump to keep it from vibrating (11) and work underneath the catwalk (8, 199, 212, Def. Exh. A, B, C,[2] estimated by the plaintiff and witnesses to be from six to sixteen inches above the pump (11, 183).

Loosening the nuts by placing the wrench around each one in turn and striking it with the mallet (8), Michalic had difficulty in doing the job (36) since the wrench constantly slipped (45, 46).

When the pumpman returned, petitioner told him "the tool is not very good, kind of beat up. * * * This wrench keeps slipping off", to which Hansen told him, "Never mind about that, do the job as best you can." (10, 36, 39), and again left (10).

Michalic continued removing the nuts. There were about three or four left when, in loosening one, he struck the wrench with the mallet, as usual, and the wrench slipped off the nut, fell and struck him on the big toe of the left foot (10, 45). He had used the same wrench and mallet during the entire period (36) and was not aware of any others in the pumproom tool box (40).

Hansen returned two hours later (11). By that time Michalic had finished the job, laid all the nuts on the catwalk, crawled out from underneath and was waiting for him (12). He couldn't leave the job (11). His feet were cold and frozen since he had been standing in water (11).

Michalic did not think the injury serious at that time (11, 41) and worked for the rest of the day, then soaked his foot in epsom salts (41). His left big toe hurt terribly, but he continued to work laying up the ship (12).

The toe nail became infected about one week after the accident but petitioner, thinking it would clear up (41), continued on duty into January, 1956 (13).

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[2] Appendix of Record 106a, 108a 110a.

After finishing work on the ORION, Michalic returned to Erie, Pennsylvania, and continually soaked the foot in hot water and epsom salts (13).

Two witnesses, fellow seamen, testified that they saw Michalic working in the pumproom (122, 125). Both saw him limping after that time aboard the ship and bathing his foot (122, 127).

Michalic was seen limping by his landlady's daughter in January, 1956 when he returned to Erie, and with a more pronounced limp in April, which necessitated the use of a cane (152, 153). She saw him soak the foot between January and March, and again after his return in April (153). He did not limp before boarding the vessel in the fall of 1955 (152).

Petitioner rejoined the vessel as a fireman in Cleveland on March 15, 1956, upon receiving instructions from the Union Hall in Detroit, and was still bathing his toe at that time (13, 14). His leg was very bad, very painful (14). In Toledo, on April 1st, the pain became unbearable and Michalic told the engineer that he wanted a hospital ticket to leave the ship for treatment (14). He informed the vessel's captain of the December accident (15), and had previously told an oiler, a fireman and a couple of forward engine crew and the third mate (27, 28, 32). He then returned to Erie, Pennsylvania (14), where he called Dr. Reister, the "Marine doctor," and told him about the foot (18). At that time there was a little drainage in the toe (42).

Harold Isenbach, corroborating the plaintiff's testimony, had sailed for nineteen years (155) and was the second mate on the ORION in December, 1955 (158). He also sailed as first mate and master in 1956 and 1957 (155) and was on the vessel for five years in all (156).

He stated that he knew the pumproom on the ORION (158), that he saw and worked with the pumproom tools (156, 167), that they consisted of various long iron bar

wrenches, monkey wrenches, pliers and tools of that nature, both steel and bronze[3] (for non-sparking purposes) (167). In December, 1955, they were "in beaten and battered condition, as usual" (167). None of the tools were new, and were beaten and battered for some time (167).

Isenbach described the pumproom area in which Michalic worked, detailing the position of various gratings, the catwalk and the pumps in the room (159).

The witness explained that Michalic had to obey the orders of his superiors (172-173).

Isenbach saw the plaintiff in October, 1955, and recalled that he walked without any trouble, although he (as well as the first assistant engineer (188, 193) knew that Michalic suffered from Buerger's Disease (174, 175). The ship's officers permitted the plaintiff to work, having knowledge of his condition (193).

On April 1, 1956, the witness saw the plaintiff walking with considerable difficulty, with his shoe top removed (175). He examined Michalic's left foot, which was swollen and festered and gave him a hospital ticket for the Marine Hospital (175).[4]

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[3] All witnesses agreed that a special non-steel, non-sparking bronze tool was used by Michalic, which explained why the tool used was so misshapen, beaten and battered. Bronze, a combination of copper and zinc, is a very soft alloy (hence its use for non-sparking purposes) and subject to the very condition which petitioner complained of, since the steel nuts pressing against the wrench jaw were purposely very tight and required strong blows in order to be loosened.

[4] Isenbach's testimony was then erroneously stricken in its entirety (183) when it was learned that he left the vessel on December 19, some nine days before the accident, on the mistaken theory that he could not know of the condition of the pumproom, tools and the pumproom itself if he was not on the ship on the accident date. As such, the Trial Court rejected evidence which rightly gave rise to the existence of the presumption of continuation of a condition in absence of evidence to the contrary.

The first assistant engineer, testifying for the defendant, stated that he had sent Michalic to assist the pumpman to raise the centrifugal pump casing and check its moving parts as part of the lay-up procedure (180, 181, 191). He further described the area of the pumproom in which the plaintiff was put to work (182-186), and explained that the tools were of a special non-sparking alloy for use only in the pumproom, consisting of different sized wrenches, hammers and scrapers (187) which he fully described (189-190).

The wrench was further described by the defendant's witness, Hansen, the pumpman, as an open end, one and five-eighth inch, made of a spark-proof alloy and weighing two and one-half pounds (207).

Hansen did not show Michalic how to use the tool (207), nor did he watch the plaintiff work (208), although he knew that he was a fireman and had no knowledge of the pumproom, of the tools to be used or of the work demanded of him.

Hansen stated that the three wrenches of the same type (214) were five years old and had been in use for the five years. The witness explained that the tools, which were not made of steel (222) but of a special spark-proof alloy (223), had not been inspected for nine months prior to their use by the plaintiff (224). The nuts, which were very firmly screwed on to form a gasket and avoid leaks, had to be taken off by striking the wrench handle with the mallet (216).

At the close of the defendant's case the Trial Court granted the renewed motion to dismiss the complaint (266).

Petitioner appealed from the order of dismissal, which was affirmed by the Court below on October 29, 1959.

Reasons for Granting the Writ

The decisions of the Courts below are in direct conflict with innumerable decisions of this Court which have assiduously resisted the efforts of Trial and Appellate Judges to usurp injured plaintiffs' constitutional right to a trial by jury. The instant case has not only destroyed that right but has done so with little or no regard for basic propositions of law as laid down by this Court.

This Court has had recent cause, on numerous occasions, to brake the tendency of lower Courts to trespass upon the province of the triers of the facts. *Rogers* v. *Missouri*, 352 U. S. 500; *Ferguson* v. *Moore-McCormack*, 352 U. S. 521.

The instant case, however, represents a unique approach by the Court below in the effort to extinguish the petitioner's right to jury trial under the misguided belief that speed of dispatch is an able substitute for justice.

The District Court dismissed the action at the close of the evidence on the novel theories, *inter alia*, (1) that no jury question was presented as to whether the petitioner was afforded a safe tool with which to work, ignoring the compelling discussion by this Court in *Jacob* v. *New York*,[5] 315 U. S. 752; that a question of fact was always presented as to whether a tool was reasonably safe and suitable for its purpose; (2) that no jury question was presented as to whether the space in which petitioner had to work constituted an unsafe place to work, and (3) in disregarding the fact that petitioner, known to be totally inexperienced in the work, was ordered into the area without instruction in the use of the special tools involved, and that he was not supervised in the work operation.

[5] The *Jacob* case held the simple tool doctrine unavailable in Jones Act actions.

The Trial Judge took upon himself the determination of all the questions of fact which should have been left to the jury and, after coming to his decision on each question, announced that none were left for submission of the case to the jury and dismissed the cause.

That Court confined its discussion and opinion to the question of negligence of the respondent, ignoring entirely the question of seaworthiness of the vessel, evidently on the assumption that if the respondent wasn't negligent, the ship could not be defective.

In the Court below, the decision turned on whether the petitioner had sufficiently described the tool's defect in order to establish the causal relation between the condition of the wrench and the slipping.

Affirmance of the dismissal of the cause, was not on the basis of any legal reasoning but was simply based on the meaning, as stated by the Court, of the language employed by the various witnesses to describe the condition of the tool. By that method, the Court below destroyed the cause simply by setting forth its interpretation of the individual words. In short, the Court was able to determine the facts of the case and by application of a self-determined interpretation of the language so weaken the causal relation of the condition to the accident that the vitality of the testimony was obliterated. By their decision the Court below, as may any Court any time that it doesn't particularly believe or favor the plaintiff's case, simply places its own meaning upon the testimony and dismissed the suit for lack of causal relation. Petitioner submits that this decision, if permitted to stand, may well mark the beginning of the jury trial by Judge by investing the Trial Judge with the autocratic power to modify the customary, accepted and widely held view of the meaning to be given to testimony.

Petitioner submits that the many cases holding that the Court should rule on a dismissal in the light most

favorable to the plaintiff. *Bailey* v. *Central*, 319 U. S. 350; *Schulz* v. *Pennsylvania*, 350 U. S. 523, has been unashamedly violated by the decision of the Court below. The loss of the benefit of doubt in the plaintiff's favor in determining dismissal motions and, in like manner, in their Appellate review would ultimately result in totality of the jury function in the Judge instead of, as it has always been, the mere determination of the existence of a material issue of fact.

Such is the decision of the Court below in the instant case. The effect will be felt, if not reversed, by every plaintiff having somewhat less than that utopian "iron-clad" case. The question is of national import not because the issues are complicated or because the decision of the lower Court will financially effect anyone other than the petitioner, but rather because of the simplicity of the problem and the ease with which the fallacy can spread. The many thousands of litigants in our overcrowded Courts, with their calendar congestions and the search for a scapegoat[6] are the only persons who will be legally emasculated by the overzealousness of the Courts in an effort to speed up the judicial process.

The Court below, after discussing the facts of the case (page 1 to page 6 of the decision) wherein the petitioner and witnesses admittedly described the wrench given to Michalic as "worn", "beat up", "old", "all chewed up on the end", "very beaten and battered", "not very good", "keeps slipping off", then concluded that:

> "To say that a wrench is old, beaten, battered or chewed up gives no information as to whether or not the wrench was adequate or inadequate to perform its function of loosening a nut. Neither do the above adjectives tell whether the grip of the wrench was in any way impaired or it was otherwise an unsafe tool. The plaintiff's evidence did not disclose what

[6] Rather than the simple fact that the number of judicial appointees has not kept apace with the population explosion.

part of the wrench was beaten, battered or defective, except that it was "chewed up" on the end. There was no evidence of any improper design of the wrench or the mallet. The evidence discloses no claim or inference by plaintiff or his witnesses that the wrench slipped or fell because the jaw of the wrench did not properly fit the nuts which were to be loosened by it. There was no evidence that the open or jaw end of the wrench was in any way deficient. We do not think merely stating that the wrench was beaten, battered, old, or chewed up is sufficient to allow an inference that it could not be used safely in the function for which it was designed. Evidence that the wrench was beaten, battered or chewed up, without other definition, was insufficient, in our opinion, to permit a jury to find that these thus described conditions, or any of them, were the cause of its slipping. The fact that the wrench slipped is not evidence that its slipping was the consequence of some condition in the jaw or handle of the wrench. There is no evidence from which it could be inferred that some condition described in the evidence contributed proximately as a cause of the slipping."

Petitioner respectfully asks which end of the wrench the Court below thought the petitioner and the witnesses were referring to when they described it? Can there be any doubt but that it was on the jaw end and not the handle in view of the great amount of testimony of constant slippage of the wrench off the bolts.

It is respectfully submitted that it was absurd for the Court below to even harbor the thought that any of the voluminous testimony describing the condition of the tool was directed to any part of the wrench other than the jaw area that came into contact with the bolts.

Can the Court below have possibly felt that the petitioner was not referring to the condition of the jaw that was supposed to grip the bolt when he explained that the wrench kept slipping off the bolts, that he complained to the pump-

man about the condition of the wrench? Is it conceivable that there could not even be an inference that the conditions, so carefully explained, could not have caused the wrench to slip? The entire case, from the original pleadings through trial was pointedly directed to just such a condition and its causal relation.

The Court below apparently (and correctly) reversed the Trial Court's exclusion of the testimony of Isenbach, petitioner's witness and the Second Mate on the ship. In so doing, it seems clear that the petitioner was even then denied the right of rebuttal testimony at which time, perhaps, the Court's belief as to causal relation could have been established. Is not the reversal alone of so important a witness sufficient to have called for a reversal of the dismissal?

The testimony was uncontradicted that the petitioner was unfamiliar with the pumproom or the operation of removing the casing and casing bolts. There was no denial that he was not given any instructions or supervision in order to insure his carrying out of the job, although obviously there was a constant danger of slippage. Even after the petitioner's complaint to the pumpman, there was no instruction or supervision. Was it not a question for the jury as to whether petitioner received adequate instructions and supervision? *Rogers* v. *Missouri*, 352 U. S. 500; *Ferguson* v. *Moore-McCormack*, 352 U. S. 521; *Schulz* v. *Pennsylvania*, 350 U. S. 523; *Tennant* v. *Peoria*, 321 U. S. 29; *Jacob* v. *New York*, 315 U. S. 752; *Lavender* v. *Kurn*, 327 U. S. 645.

The Court below talked only of negligence under the Jones Act, 46 U. S. C. § 688, ignoring completely the cause of action for unseaworthiness irrespective of negligence. Certainly, the question of whether the wrench was in fact unseaworthy should have been submitted to the jury. *Mahnich* v. *Southern*, 321 U. S. 96.

Petitioner respectfully prays that this Honorable Court will once again endeavor to instruct the lower Courts of the inviolate, though sometimes shadowy, line of the jury province in order that the petitioner and those thousands of future litigants, may have the full benefit of the right of jury trial.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: January 25, 1960.

Respectfully submitted,

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Goldstein & Sterenfeld,
of Counsel.

Harvey Goldstein,
on the Brief.

APPENDIX

(Opinion of U. S. Court of Appeals for the Sixth Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 13,580

THOMAS S. MICHALIC,

Plaintiff-Appellant,

—v.—

CLEVELAND TANKERS, INC.,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Decided October 29, 1959

Before:

SIMONS and ALLEN, *Circuit Judges*, and O'SULLIVAN, *District Judge*.

PER CURIAM. This action by a seaman, under the Jones Act (Title 46, U. S. C. A., Section 688), concluded by the District Judge's direction to a jury to return a verdict of no cause of action. The propriety of such direction is the matter here for review.

For some years prior to December 28, 1955, plaintiff had been suffering from Buerger's disease. In 1951 he

was hospitalized from an injury consequent upon dropping a sack of cement on his foot, although which foot was not disclosed. In 1952 he was again hospitalized and he then learned that he was suffering from Buerger's disease in his left foot. Some surgery, including the cutting of a nerve in his back, was performed for the purpose of relieving pain which he was then suffering in his left leg.

He claims that on or about December 28, 1955, while using a wrench to remove nuts on a pump housing on defendant's vessel, the wrench, when he struck it with a mallet, slipped and fell, striking the big toe in his left foot. Without interruption, he continued working on the vessel until the conclusion of the lay-up in January, 1956. He rejoined the vessel on March 15, 1956. Plaintiff testified that after a few trips on the boat his leg became so bad he could no longer stand it. He then told his superior officers he wished to get off the boat and asked for a hospital ticket. This was on April 1, 1956. He then, for the first time, told of the claimed incident of the dropping of the wrench. Until then he had told no one of the incident, although he testified that his toe had begun to bother him immediately following the occurrence, requiring him to bathe it rather continuously while on the boat and after the season of navigation while ashore. He did not tell of the accident to the pumpman who had been working with him in the pumproom on the day it occurred. He said he did mention it to a couple of deckhands. Upon receipt of the hospital ticket he went to a Marine Hospital where several amputations were performed, the final one resulting in the amputation of his leg above the knee.

Plaintiff's complaint charged that the vessel and its equipment were unseaworthy and that the defendant was negligent. Aside from some general conclusionary allegations of negligence and unseaworthiness, his specific charges upon which he relied for a cause of action consisted of assertions—

That the defendant did not provide a safe place or way to work; that defendant provided him with a defective wrench, knowing that, "the teeth of the wrench would not hold or be secure"; that defendant ordered and permitted him to work in close quarters; that defendant should have known of a defective condition of the teeth of the wrench; that defendant failed to provide him with a proper and secure wrench which would not loosen when average pressure would be applied; that defendant failed to provide adequate, proper and seaworthy and safe appliances to wit: a proper wrench without worn teeth; that defendant failed to maintain a proper lookout for the plaintiff, and failed to supervise the removal of the nuts off the pump, and to replace a defective, old and unseaworthy wrench; that defendant failed to provide plaintiff with skillful, careful and competent co-employees.

On the trial it was disclosed, without dispute, that the wrench being used by plaintiff did not have any teeth in it, but was an open-end wrench, with a jaw opening of about $1\frac{5}{8}$ inches, approximately 12 inches long and weighing $2\frac{1}{2}$ pounds. It was made of spark-proof alloy metal. Plaintiff was also provided with a metal mallet for the purpose of striking the wrench in the process of loosening the nuts.

On this review, we accept plaintiff's proofs as true and in their most favorable light. Plaintiff and a fellow workman described the condition of the tools with which he was working variously as follows:

"It was a big wrench, old, beat up wrench."

"An old lead mallet they used in the pumproom."

"It was an old wrench, all chewed up on the end."

He testified he told the pumpman:

"This tool is not very good, kind of beat up. This wrench keeps slipping off."

The pumpman said:

"Never mind about that, do the job the best you can."

A former Mate and Captain of the vessel who had been discharged by defendant, described the tools being used in the pumproom in December, 1955, as being, "in beaten and battered condition * * * they had been very beaten and battered."

Although plaintiff's pleadings made no charge of inadequate light or cramped quarters in the pumproom, the following testimony was received on these subjects:

As to illumination, plaintiff said, "to my estimation, it was poor, very poor."

"Q. Did they have any other electricity? A. No, sir, they only had shore lights that's all.

"Q. As far as the illumination in that room, what other illumination was there besides the portable light? A. Nothing, that's all we had, just the portable light.

"Q. And where was it hanging? A. The portable light was hanging over the pumpman's pump on the port side. He had a string tied to it and it was hanging right down beside his pump."

Referring to the portable light in the pumproom, he stated:

"I attempted to move it over to where I was, but it was too short, it wouldn't reach my pump at all."

"Q. Was there any light provided at the catwalk in that area at all, other than what you have described? A. No, sir."

Referring to the portholes between the engine room and pumproom, plaintiff said:

"Those portholes were all dirty and greasy from grease flying around the pumproom."

A fellow workman testified in relation to the light:

"Well, the pumproom wasn't too large. It wasn't a large pumproom and the lighting wasn't too good. In fact, we had to use an extension cord."

The former Mate of the vessel, referring to the lighting in the pumproom, said:

"Very poor. In this lower level at all times it was necessary to use a flashlight in order to see anything in working on this grating level or below."

As to the cramped space in the pumproom, plaintiff testified:

"I was ordered to go into the pumproom. This is the catwalk going from one end of the ship, from the starboard to the port side * * *"

"Q. Now, did you have to get off the catwalk? A. Yes, sir. I had to get off that catwalk, and I had to crawl between four beams that hold the pump from vibrating, work underneath the catwalk.

"Q. As you were working there you stated you had to get between four beams. Can you describe them a little bit? A. Yes, I can. The four beams they help the pump. When the pump is pumping out cargo in a port, the four steel beams that come around the pump keep the pump from vibrating when they are pumping out.

"Q. What is the distance from the top of the pump to the catwalk where you had to go in there and work? A. About six inches.

"Q. Is that the area you had to work? A. Yes."

The above constitutes substantially all of the evidence relevant to the conditions in the pumproom and the con-

dition of the tools with which plaintiff was working. There was no testimony in any way supporting a claim that the slipping or dropping of the wrench was brought about by, or related in any way to, the lighting conditions of the pumproom or to the smallness of the area. Plaintiff had actually removed all but five of an estimated total of twenty nuts before the wrench fell. He makes no claim that the progress of his work was in any way impaired or made more difficult by inadequate lighting or cramped quarters.

"Q. You had no difficulty seeing the bolts, did you? A. No, sir."

Plaintiff's description of the accident is as follows:

"Q. What happened after you took off the bolts and nuts? A. After I started taking the bolts off with the old wrench, only about three or four more to get loose, a couple of them, I had hold of a nut * * * and I hit the wrench and it slipped off and it hit me on the foot at the big toe."

* * *

"Q. Now, when you were taking the bolts and nuts off, how many of those nuts had you taken off at the time the wrench slipped? A. I had them all off but about five or six.

"Q. You took those off without difficulty? A. I had a hard time loosening them off.

"Q. But you got them off? A. Yes.

"Q. In other words, you put the wrench on there and tapped it with the mallet and loosened them and then you turned the nuts off? A. I had a hard time taking them off.

"Q. But you took them off? A. Yes. The pumpman told me, 'Do the best you can.'

"Q. You got them off, and you got all but how many off at the time the accident occurred? A. About five.

"Q. And you were using the same wrench? A. The same wrench.

"Q. And the same mallet? A. Same mallet all the way through."

* * *

"Q. Did you become aware that this wrench as you have described, was getting worn as you were taking these nuts off? A. I told him about it, yes sir.

"Q. Did you go out and try to get another wrench out of the box? A. No, sir, he told me 'You do the best you can with that wrench right there.'

"Q. He told you not to use another wrench? A. He said, 'You do the best you can with that wrench right there.'

"Q. That's the only wrench you could use? A. The only wrench that I had to use."

* * *

"Q. Now, will you describe with as much particularity as you can just how the wrench slipped off the nut? A. Like I say, I had the wrench in my hand.

"Q. You were standing next to the pump? A. I was standing. I got hold over here, and I hit it with the mallet and it slipped off the nut and came down the side of the pump and hit my big toe.

"Q. You hit the handle of the wrench with the mallet? A. Yes, she slipped off the nut on the pump and came down the side of the pump and smashed my big toe.

"Q. That's exactly the way you did it on all the others? A. I had to use the mallet on all the nuts, that's right. They were pretty tight.

"Q. In other words, you had gone through the same maneuver on the others as you had with this? A. Yes, sir.

"Q. Did you have any difficulty putting the wrench on the nuts before hitting it with the mallet? A. Yes, sir, they slipped.

"Q. What slipped? A. The wrench did."

* * *

"Q. I am talking about putting the wrench on the nuts. Did you have any difficulty putting the wrench on the nuts you took off? A. I told you the wrench was slipping off the nuts. It slipped off every one of them."

A fair reading of the District Judge's oral opinion given when granting the motion for a directed verdict, indicates his conclusion that there was no evidence from which the jury could make a finding of negligence or unseaworthiness. We concur in this conclusion and further express our opinion that there was a failure of proof as to any causal connection between the conditions which plaintiff complained of, namely, improper lighting, close quarters and improper tools, and the injury which he suffered.

Neither by accepting plaintiff's proofs in their most favorable light nor by drawing all legitimate inferences therefrom, can it be said that insufficient light or cramped working space had anything to do with the slipping of the wrench which was the immediate cause of the plaintiff's injury.

We come, then, to consideration of whether there was any evidence from which a jury could find that negligence of the defendant or unseaworthiness of the vessel and equipment in any degree contributed to the slipping of the wrench and its falling upon the plaintiff's foot. The allegation of the complaint with reference to teeth of the wrench being worn was abandoned upon showing that it had no teeth, but was an open-end wrench. To say that a wrench is old, beaten, battered or chewed up gives no information as to whether or not the wrench was adequate or inadequate to perform its function of loosening a nut. Neither do the above adjectives tell whether the grip of the wrench was in any way impaired or it was otherwise

an unsafe tool. The plaintiff's evidence did not disclose what part of the wrench was beaten, battered or defective, except that it was "chewed up" on the end. There was no evidence of any improper design of the wrench or the mallet. The evidence discloses no claim or inference by plaintiff or his witnesses that the wrench slipped or fell because of any inadequate grip, nor that the wrench slipped or fell because the jaw of the wrench did not properly fit the nuts which were to be loosened by it. There was no evidence that the open or jaw end of the wrench was in any way deficient. We do not think merely stating that the wrench was beaten, battered, old, or chewed up is sufficient to allow an inference that it could not be used safely in the function for which it was designed. Evidence that the wrench was beaten, battered or chewed up, without other definition, was insufficient, in our opinion, to permit a jury to find that these thus described conditions, or any of them, were the cause of its slipping. The fact that the wrench slipped is not evidence that its slipping was the consequence of some condition in the jaw or handle of the wrench. There is no evidence from which it could be inferred that some condition described in the evidence contributed proximately as a cause of the slipping.

The recent cases of *Rogers* v. *Missouri Pacific Railway Co.*, 352 U. S. 500, and *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, relied upon by appellant, emphasize the jealousy with which today's courts guard the rights of injured workmen to have their causes submitted to a jury where there is any evidence, however slight, to justify a jury's factual finding of liability. The rule that the plaintiff in such a case as this has the obligation to produce some evidence to prove, or permit a justifiable inference of, negligence and proximate cause is, however, still a part of our law. It is the function and duty of trial courts to determine whether or not in a particular case there is any evidence to justify the submission of a case to a jury.

In the case of *Ferguson* v. *Moore-McCormack*, supra, the Supreme Court affirmed the rule that the standard of liability under the Jones Act is the same as applied in actions under the Federal Employees Liability Act. In a case arising under the latter Act, the United States Supreme Court in the case of *Moore* v. *C. & O. Railway Co.*, 340 U. S. 573, 575, said:

"To recover under the Act, it was incumbent upon petitioner to prove negligence of respondent which caused the fatal accident."

We approve the ruling of the District Judge that the plaintiff in this case failed to provide any evidence from which a jury could find liability. It should be noted here that on his second cause of action for maintenance and cure, plaintiff recovered $2,610.00. No appeal was taken from that judgment.

The judgment of the District Court is affirmed.

Opinion of District Court

The Court: Let me start where Mr. Sampliner left off. It is true when you were asking questions of the prosthesis man from Detroit we sustained objections because you asked a variety of questions which were improper. Had you asked the question of the cost it would have been admitted, should have been admitted. You never made any effort to ask that, but I assume whatever the bill is you have got it and there is no question on its mere presentation it will be accepted."

This has been a case which has caused us some worry in some respects, particularly as we look forward to what appear to be the prospective proximate causes with which the jury might have been concerned, if the jury was going to be concerned. We have the original possible proximate cause that the man's condition could have been caused had he had the condition back in '48. The jury might well have found that the leg would have come off anyway because of the condition, or there could have been an aggravation of the condition caused by the man's own conduct, in that he never abated the smoking habit until very, very recently, and then not completely. In other words, for whatever reason, he would not give up smoking, knowing it was the most dangerous thing in the world for him. That was [253] the second possible proximate cause.

Then you have the possible cause of trauma here, if trauma would have been found by the jury to have hastened what happened. But at no time was any medical man asked any opinion as to the degree to which it would have been hastened, and the jury, if they would have gotten the case, would have no information to go on other than the fact it was hastened.

Of course, there was always the fourth possibility that the jury might say a man with such a history, such a terrible

illness, and it is a terrible illness, why the Lord permits it is His business, no one seems to know what starts it, there was a possibility a jury would figure a man who would have such an illness would have run and reported it the minute he hurt himself, knowing the prospect he had of a very serious injury as the result of a very serious injury to himself for which his employer was in no way responsible. The fact he didn't report it for some months might be considered as some evidence [254] by the jury he was never hurt in the way in which he says.

This business of Buerger's Disease has reached the point where there is quite a bit of elucidation about it. The man had numbness in his leg in 1949, he had a sympathectomy in 1951; hit the same toe with a fire brick in '51 or '52; never stopped smoking. Then we had the experts who really told us about this amputation business, as far as they are concerned. Dr. Bright said out of a 150 to 170 cases 15 percent of those who wouldn't quit smoking lost their foot. Dr. Silbert in New York was reported to have said, and he is apparently the highest authority in their specialty, that out of 436 cases that stopped smoking he avoided amputation.

Now, then, the petition set up the claim with reference to what was wrong with the wrench—"using an old defective wrench in an unseaworthy condition in that the teeth and grip of the wrench were worn and defective". Never, from one end of the lawsuit to the other, has the word "teeth" been used [255] of that wrench. There has never been one mention of the fact the teeth were worn. Never has there been a mention of the fact the grip was worn, not one iota of testimony. And after I called this to the attention of all counsel on motion at the end of the plaintiff's case, the plaintiff's counsel sought to rehabilitate himself on the wrench with the cross-examination of defense witnesses, and successfully proved the wrench had no teeth.

As a matter of fact on that type of wrench there are no teeth, so there is no iota of evidence the teeth had been worn and no iota of evidence that the grip was worn, and the grip has not been mentioned from the time of the lawsuit to this minute.

So the plaintiff has proved no part of his contention with reference to defect; and the defect in the wrench is the foundation of the plaintiff's claim here.

I know the plaintiff mentioned the fact the wrench wasn't any good. The pumpman says they never discussed any such thing. Now, as Mr. Sampliner says, what the pumpman said could be considered by the jury, as [256] between what two witnesses say, one of whom was working for the defendant, should it get that far. The pumpman says "this is a tool I bought five years ago and there are three of these on this ship"; they are used for only one purpose once a year; "we use them to take the nuts off the pump head casing; and having been used just five times in five years there is absolutely nothing wrong with the wrenches." Should a jury be called upon to decide as to which of the two contending witnesses was right, when the plaintiff had only testified there was some defect in the wrench, and he starts out on the theory the teeth are worn, and there are no teeth, and he starts out on the theory the grip is worn, and there is never any mention of the grip in the case until I mentioned it right now?

For authority they tell me what the Supreme Court has required. That's why we checked the case Mr. Sampliner mentioned, and I called counsel's attention to it after plaintiff's case was completed, because of the detailed description there given of that wrench which was considered to be improper, [257] and in that case there is given quite a bit of description about the wrench, what it would do and what it would not do, and why it slipped. We do not have that here. All we have here is the conclusion of the plaintiff.

the conclusion it is defective, it is worn, it is an old wrench, chewed-up wrench. Nowhere in this case is there anything on which this jury could ever be called upon to decide to what degree the teeth had been worn and to what degree the grip had been worn because neither the teeth nor grip have been mentioned since the time the lawsuit began.

Now, in the Jacob case, as I said before, it was a case where the Court said it was a close question, a closely decided case, because as I said before three of the Judges of the top court were on one side of the fence and three on the other and they were evenly divided. They go on to say what the jury might have been called upon to have decided. That is to say, it was for the jury to decide whether a monkey wrench was a reasonable safe and suitable tool. It was said that if he hadn't liked the wrench he used, he could have used another wrench, so the Court said the [258] jury should have decided whether a monkey wrench or a prospectively substituted wrench should have been used, and whether it was reasonably safe for the work in hand. Next there was a question whether the respondent's failure, when it had two or possibly three weeks to supply the petitioner with a new wrench, amounted to negligence. That man had complained about the wrench in the three weeks three times, and he had to use it every time the boat made a trip across the river, and it was crossing the river all the time, and each day he had to take nuts off some part and put them back.

We have no such situation here. So, actually, what they said there was that the case should have gone to the jury on the ground whether the ship company was negligent for having failed for a period of three weeks to get the man another wrench.

Here we have no proof of defect. We have a conclusion about an alleged defect. And the question that we must also then consider is if the jury has nothing to go on but

[259] the conclusions of this plaintiff, then must we submit the case to them? A man takes the stand and says, "I had a tool which was defective." Period. That's what this man said. He has come to the conclusion which only the jury is allowed to reach. Now, must they be given the case to decide whether or not they will accept his conclusion, when they are not given evidence of the facts on which his conclusion is based?

I think the obvious answer to that is it simply cannot be done.

Now, let's get down to his work. At one point in the case it was stated there were 35 or 40 nuts to be handled, another point 25, and another point 20; and another point it was said he had taken off all but four or five or six or seven nuts. In any event the tool seemed to do very well up to a point where something happened. He demonstrated how he hit this so-called grip of the wrench—he never used the word grip, I used it—with the hammer, holding it in the left hand and striking down with the right. I don't know whether he was tightening the nut or not, but it looked like he was. It has been suggested maybe he hit it too hard. I do not [260] know. All I know is what the evidence has shown, that it had a smooth jaw. That was brought out on cross-examination by plaintiff's counsel, when plaintiff's counsel did seek to rehabilitate his case because at the end of plaintiff's case I had suggested that there was no proof, in accordance with the petition, with reference to the claim set up. So plaintiff's counsel, and very properly so, that is his privilege and his right and duty, was trying to show if he could on defendant's proof he had a case, and the only evidence he elicited was that it was a smooth wrench.

Now, it is claimed by the complaint that this was a worn tool. The proof was that it had been used five times. The claim is it was defective, and beyond using the word, there is no proof wherein it was defective, no proof the teeth

were worn, for it had no teeth, and no proof its grip was worn because grip was never mentioned until I decided to talk about it here. None of the allegations set forth in the petition are proven, and no effort to correct or amend the petition, and no suggestion a mistake had been made and there was [261] something else wrong with it.

Incidentally, while I put it on the record, it is really off the record, I asked counsel three or four times in pretrial wherein this thing was defective, and all the answer I was ever able to get was that it would come out in the lawsuit, and the answer that it would come out in the lawsuit is no answer at all.

So this gentleman either got 15 nuts out of 20 or he got 34 out of 40, either way; he wasn't doing too bad a job with the wrench, and it is probably no wonder because the wrench had been used on five other occasions and probably was in splendid shape.

It, finally, does not have the defects claimed and no other defects are suggested. What could the jury be called upon to determine with reference to the wrench? Wherein can reasonable minds differ on what we have here? What defect has plaintiff talked about concerning which the jury could be called upon to judge whether there is a defect there or not? Is it that the teeth are worn, when there are no teeth? Or that the grip is worn, when the grip has never been mentioned? Or am I required, [262] to hand to the jury just a conclusion of a plaintiff, who of course has an interest in the case, which is understandable, but who merely says, "It is worn. It is defective. It is chewed up. And for that I want $350,000."

A man has been carrying a defect, and it is too bad he does, for some eight or nine years, or longer for all we know. He is very conscious of it. He had been operated on to stop the pain, cutting the nerves to stop the pain. The condition goes on. But the point is, I suppose to a degree he could

have had this same thing happening in another way. He could have got it on another ship he was on, or perhaps got it on no ship, but he is the only one to decide that, the only one who should decide it.

I would assume the highly-specialized counsel in the Court Room learned quite a bit about Buerger's Disease in this lawsuit as I did, and everybody else listening to the doctors. There is not much disagreement about this.

He washed the foot, he did nothing to stop smoking except very recently, to prevent [263] aggravation of that condition which has been going on since 1948. He could have got it if he never hit his foot, of course we don't know if he hit his foot, nobody knows but him. There is always the possibility if he did hit his foot he would have reported it instantly, because no one knew better than him the implication, the future he had immediately on hurting himself, if he hurt himself. The fact that he didn't report it, kind of militates against his claim that he did hurt himself.

Much is said about the lights here. Since plaintiff said he had no difficulty in seeing the nuts when he took them off, I don't think the lights are involved in the case at all.

Counsel in his last discussion talked about how cramped the space was. Well, we have seen the photographs. It is not cramped to the point where he couldn't get at the casing; the other man got to his.

Counsel for plaintiff suggests, oh, he wasn't used to this, he was a fireman. Sure he is, but the testimony seemed to be part [264] of the job when they lay-up and fit-out was to do the very work around this pump they were doing. Of course, he couldn't have had much experience doing it, nor would he need much. He was around the ship a few years and once a year they did the work, which is the reason why the wrench probably wasn't worn at all, probably was just as smooth as his immediate superior related. He said there were no worn places, it was in good condition, and that the plaintiff never complained to him about it. He

testified that he had three wrenches all of the same size, all three good, they weren't chipped. He checked them when they came out of the tool chest, and he was cross-examined when he checked them, but he said nine months before meaning they hadn't had to look at them since they put them away, there was no reason to look at them, meaning it was about as unused a tool as there was on the ship because once a year they got it out for these 30 or 40 nuts. Pretty much as you would remove a tire when you get a flat and have to take off a half a dozen nuts. You [265] don't wear out your nuts or bolts; you don't wear out wrenches using them once a year for five years.

I will say again, gentlemen, I don't see anything here on which reasonable men could differ. So I find not one iota of evidence on the claims set forth in the complaint, which has never been modified, changed or amended at any time or any claim suggested that it be so amended.

I see no reason for discussing the simple tool doctrine. I do not think in the Jacob case the Supreme Court intended to abrogate it and so it has no application. I am not called upon so to say. My question is, is there any evidence concerning which reasonable minds on a jury might differ? No negligence has been offered for the consideration of this jury in the form of such defects in this tool as have been complained of throughout this case, and reasonable minds could not honestly differ as to whether the teeth in the wrench were worn when there are no teeth in the wrench. And reasonable minds could not honestly differ as to whether the grip is worn, when the grip [266] isn't mentioned from the time the case began until I mentioned it in this little discussion.

Since there is no proof in this case I grant the motion here.

Mr. Sampliner: We note an exception here and we will appeal.

Order of Dismissal of the District Court

In conformity with Rule 77(d) of the Federal Rules of Civil Procedure please take notice that the following order or judgment was entered on Feb. 27, 1958. C. B. Watkins, Clerk, U. S. District Court, Northern District of Ohio:

Upon a verdict of the jury, by direction of the court, finding for the defendant on the first cause of action, and for the plaintiff on the second cause of action, for maintenance and cure, in the sum of $2,610.00,

IT IS ORDERED that the first cause of action is hereby dismissed.

FURTHER, IT IS ORDERED that plaintiff recover from the defendant, on the second cause of action, the sum of $2,610.00 and costs, for maintenance and cure.

/s/ C. B. WATKINS,
Clerk.

Judgment of the United States Court of Appeals for the Sixth Circuit

Appeal for the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause by and the same is hereby affirmed.

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TABLE OF CASES.

In the Supreme Court of the United States

OCTOBER TERM, 1959.

No.

THOMAS MICHALIC,

Petitioner,

vs.

CLEVELAND TANKERS INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

COUNTER STATEMENT OF QUESTION PRESENTED.

Whether in an action for damages under the Jones Act, where there is no reasonable evidence as to negligence, unseaworthiness and proximate cause, the Trial Court is justified in taking the case from the jury.

COUNTER STATEMENT OF FACTS.

The petitioner's statement of facts is, in the main, accurate. It should be pointed out, however, that the injured party by his own testimony removed the issues as to lack of proper illumination and lack of working space from the case (pp. 24, 28) leaving for determination by the Court as to whether there was any evidence from which a jury could find that the negligence of the defendant, or the unseaworthiness of the vessel, in any way contributed to the slipping of the wrench and the injury sustained to the plaintiff's foot.

Inasmuch as, in the consideration of the question presented by the petition, the proofs presented by the plain-

tiff must be considered to be true and in their most favorable light, no useful purpose would be served by a detailed reference to the facts, at this juncture.

REASONS FOR DENYING THE PETITION.

1. The decisions below are in conformance with the rule, often announced by this Court, that in a Jones Act case the plaintiff must produce some reasonable evidence to prove or permit a justifiable inference of negligence, unseaworthiness and proximate cause and that it rests with the Trial Court to determine whether that evidence exists. The decision below does not conflict with any of the decisions of this Court.

The facts in this case have already received the thoughtful consideration of the two lower Courts. The petitioner seeks a third review by this Court on the ground that the direction of a verdict for the respondent at the conclusion of all of the evidence constituted a usurpation of the petitioner's constitutional right to a trial by jury. It can hardly be reasonably urged that the direction of a verdict constitutes an abridgement of the right to a jury trial, *per se*. What the petitioner probably means to contend is that the action of the trial court, as affirmed by the Court below, constituted an unwarranted invasion of the function of the jury as the trier of the facts.

In relying upon *Rogers v. Missouri*, 352 U. S. 500, and *Ferguson v. Moore-McCormack*, 352 U. S. 521, the petitioner has seen fit to disregard the language appearing in both decisions which leaves undisturbed the obligation on the part of the plaintiff to produce some evidence to prove or permit a justifiable inference of fault upon which liability may be imposed. In *Rogers v. Missouri*, *supra*, this Court said (pp. 506, 507):

"Under this statute the test of a jury case is simply whether the proofs justify *with reason* the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also, *with reason*, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, *with reason*, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. * * *" (Emphasis supplied.)

At three places in the above quoted portion of the opinion there is reference to the requirement that there must be a "reasonable" basis for the finding that negligence exists and that it played some part in the injury or death. That requirement is not satisfied by proof that is not "reasonable" and it must necessarily rest with the Court and the Court alone to evaluate the proof in that regard. The above cited decisions are undoubted authority for the proposition that it does not rest with the trial court to make a quantitative analysis of the proof, but there is no language in them, or in the innumerable decisions to which the petitioner refers, that deprives the trial court of the initial right to determine whether reasonable minds could or could not disagree. That has been and still is the time honored test, and, unless it is met, the jury has no function to perform.

This case does not present a situation requiring the intervention of this Court to determine whether there was *sufficient* evidence to send the case to the jury. The two Courts below, after accepting the plaintiff's proofs as true, and in their most favorable light, concluded that there was

no evidence of fault and proximate cause. Upon that determination the case ceased to be one for the jury, and, unless the right to make that initial determination by the trial court is preserved inviolate, the simple expedient of filing a suit and submitting proof would require the submission of a case to a jury. This and other Courts have zealously guarded the rights of injured workmen to have their causes submitted to a jury, but they have not permitted an eroding away of the requirement that there be something for the jury to determine.

The trial court considered the issues as to negligence, unseaworthiness and proximate cause and found an absence of proof as to all three. An affirmance, *per curiam*, by the Circuit Court of Appeals, followed.

The proper function of the trial court in determining whether a case under the Federal Employers' Liability Act should or should not be submitted to a jury is clearly set forth in a concurring opinion of this Court in *Wilkinson v. McCarthy*, 336 U. S. 53, at pages 64 and 65. That language applies with equal force, to a case under the Jones Act.

2. The petition does not present a question of great national importance, nor the construction of a statute. It involves a controversy between private litigants with the sole issue the evaluation of evidence by this Court.

We respectfully suggest that this case does not present issues which justify the exercise by this Court of its certiorari jurisdiction. That jurisdiction, this Court has said "is to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U. S. 251, 258. Those important considerations do not exist here. Stripped of all of the non-essentials, this is but another one of the hundreds

of cases in which the defeated party in the Circuit Court of Appeals seeks another hearing. It is common knowledge that the docket of this Court is crowded with cases involving questions of national importance. No sound reason has been advanced for the further overburdening of the Court with a case that is a prototype of so many others and that does not contain a single factor which requires appellate review.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

LUCIAN Y. RAY,
Counsel for Cleveland Tankers Inc., Respondent.

McCREARY, HINSLEA & RAY,
Of Counsel.

Supreme Court of the United States

October Term, 1960

No. 31

THOMAS MCDANIEL,

Petitioner,

against

CLEVELAND TANKERS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONER

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Supreme Court of the United States

October Term, 1960

No. 31

THOMAS MICHALIC,

Petitioner,

against

CLEVELAND TANKERS INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the United States Court of Appeals for the Sixth Circuit (R. 106-114) is reported at 271 F. 2d 194.

Jurisdiction

The judgment of said Court of Appeals was entered on October 29, 1959. The petition for writ of certiorari was filed on January 28, 1960, and was granted on March 7, 1960. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

Questions Presented

1. In this seaman's action for damages for personal injuries predicated upon the Jones Act, 46 U. S. C. § 688, and the general maritime law doctrine of seaworthiness,

whether the Courts below committed error in granting (and affirming) respondent's motion for a directed verdict, holding that:

(a) no issue of fact existed as to whether petitioner was afforded working tools reasonably safe and fit for the purpose intended on the sole basis of self-determination of meaning and weight to be given to descriptive testimony by each witness;

(b) no issue of fact existed as to whether petitioner was afforded a reasonably safe place to work;

(c) no issue of fact existed as to whether petitioner was given proper instruction and supervision under all the prevailing circumstances, in order to carry out his duties.

2. Whether the Court below, conceding the District Court's error by its apparent reversal of rulings by the Trial Judge, was itself in error in holding harmless:

(a) the Trial Court's rejection of descriptive testimony which would or could have dispelled that Court's pessimism as to sufficiency of the very evidence that became the basis for affirmance of the dismissal;

(b) the Trial Court's literal, narrow interpretation of the complaint as justification for granting the dismissal motion.

Statute Involved

Jones Act, 46 U. S. C. § 688:

"§ 688. RECOVERY FOR INJURY TO OR DEATH OF SEAMAN

Any seaman who shall suffer personal injury in the course of his employment may, at his election,

maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Statement of Facts

Thomas Michalic, 44 years old, had sailed on the Great Lakes for about four years (6).[1] He joined the S. S. *Orion* as a fireman in October, 1955 (7). He had previously worked for the respondent for about three years (7), was in good health and able to work (19, 59, 62).

Michalic worked in the firehold, his duty was to keep the steam pressure up and to watch the water in the boilers (7).

In December, 1955 the vessel was in Cleveland for lay-up after the sailing season (8). At 8:00 o'clock A. M. while in the firehold (8), petitioner was ordered by the first assistant engineer (8, 61), his superior officer (7), to assist Hansen, the pumpman, in the pumproom (8, 61). As a fireman, Michalic had never been in a pumproom (23) and knew nothing about the work (24). Hansen told Michalic to work on the starboard pump, to knock the nuts off the casing (cover) (72), that he would work on the other one (9, 10). For the purpose, he gave petitioner "a big wrench, old beat-up wrench" (9) and "an old lead

[1] Pages of the transcript of record.

mallet" (9). The wrench was about a foot long "open end" and "all chewed up on the end" (10). Hansen then left Michalic to do other work (10, 72).

Michalic had to leave the pumproom catwalk which ran athwartship (9, 10), crawl forward between four beams holding the pump to keep it from vibrating (10) and work underneath the catwalk (10, 66, 72; Def. Exhs. A, B, C, 101, 103, 105) estimated by the petitioner and witnesses to be from six to sixteen inches above the pump (12, 56).

The casing nuts, which were deliberately firmly tightened to form a gasket to avoid leaks, had to be loosened by striking the wrench handle with the mallet (74), subjecting the inner working area of the wrench jaw to repeated blows from the steel nuts. Placing the wrench around each nut in turn and striking it with the mallet (11, 74), Michalic had difficulty in doing the job (22) since the wrench constantly slipped (26).

When the pumpman returned, petitioner told him "the tool is not very good, kind of beat up. * * * This wrench keeps slipping off", to which Hansen told him, "Never mind about that, do the job as best you can" (11, 22, 24), and again left (11).

Michalic continued removing the nuts. There were three or four left when, in loosening one, he struck the wrench with the mallet, as usual, and the wrench slipped off the nut, fell and struck him on the big toe of the left foot (11, 25, 26). He had used the same wrench and mallet during the entire period (22) and was not aware of any others in the pumproom toolbox (24).

Hansen returned two hours later (12). By that time Michalic had finished the job, and had laid all the nuts on the catwalk, crawled out from underneath and was waiting for him (12). He couldn't leave the job (12). His feet were cold and frozen since he had been standing in water (12).

Michalic did not think the injury serious at that time (12, 25) and worked for the rest of the day, then soaked his foot in epsom salts (25). His left big toe hurt terribly,

but he continued to work laying up the ship (12). Two witnesses, fellow seamen, testified that they saw Michalic working in the pumproom (29, 31). Both saw him limping at that time and bathing his foot (30, 31). The toenail became infected about one week after the accident but petitioner, thinking it would clear up (25), continued on duty until January, 1956 (13).

After finishing work on the *Orion*, Michalic returned to his home in Erie, Pennsylvania, and continually soaked the foot in hot water and epsom salts (13). He was seen limping by his landlady's daughter in January, 1956 when he returned to Erie, and with a more pronounced limp in April, necessitating use of a cane (33, 34). She saw him soak the foot from January to March and again after his return in April (33, 34). He did not limp before boarding the vessel in the fall of 1955 (33).

Petitioner rejoined the vessel as a fireman in Cleveland on March 15th, 1956 upon receiving instructions from the Union Hall in Detroit and was still bathing his toe at that time (13). His leg was very bad, very painful (13). In Toledo on April 1st, the pain became unbearable and Michalic told the engineer that he wanted a hospital ticket to leave the ship for treatment (13). He informed the vessel's captain of the December accident (14) and had previously told an oiler, a fireman a couple of forward engine crew and the third mate (18, 19). He then returned to Erie (14), where he called Dr. Reister, the "Marine doctor", and told him about the foot (16).

Harold Isenbach, corroborating petitioner's testimony, had sailed for nineteen years (34) and was the second mate on the *Orion* in December, 1955 (36). He also sailed as first mate and master in 1956 and 1957 (34), and was on the vessel for five years in all (35). He stated that he knew the pumproom on the *Orion* (36-37), that he saw and worked with the pumproom tools (41, 42), that they consisted of various long iron bar wrenches, monkey wrenches, pliers and tools of that nature, both steel and

bronze[2] (for non-sparking purposes) (41, 42). In December, 1955 they were "in beaten and battered condition, as usual" (41). None of the tools were new, and were beaten and battered for some time (41).

Isenbach described the pumproom area in which Michalic worked, detailing the position of various gratings, the catwalk and the pumps in the room (37). He explained that Michalic had to obey the orders of his superiors and to work where he was told with the tools given him (44).

Isenbach saw the plaintiff in October, 1955 and recalled that he walked without any trouble (45). Although he (as well as the first assistant engineer) (45, 49, 62) knew that Michalic suffered from Buerger's Disease (45), the ship's officers permitted the petitioner to work, having knowledge of his condition (62).

On April 1st, 1956 the witness saw the petitioner walking with considerable difficulty, his shoetop removed (45). He examined Michalic's left foot which was swollen and festered and gave him a hospital ticket for the Marine Hospital (45).[3]

The first assistant engineer, testifying for the respondent, stated that he had sent Michalic to assist the pumpman to raise the centrifugal pump casing and check its moving parts as part of the lay-up procedure (55, 61). He further described the area of the pumproom in which the plaintiff

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[2] All witnesses agreed that a special non-steel, non-sparking bronze wrench was used by Michalic, which explained why the tool used was so misshapen, beaten and battered. Bronze, a combination of copper and zinc, is a very soft alloy (hence its use for non-sparking purposes) and subject to the very condition of which petitioner complained.

[3] Isenbach's testimony was then erroneously stricken in its entirety (47) when it was learned that he left the vessel on December 19th, nine days before the accident, on the mistaken theory that he could not know of the condition of the pumproom tools and of the pumproom itself, if he was not on the ship on the accident date. As such, the Trial Court erroneously rejected evidence admissible by reason of the presumption of continuation of a condition in absence of evidence to the contrary.

was put to work (55-57), and explained that the tools were of a special non-sparking alloy for use only in the pumproom, consisting of different size wrenches, hammers, and scrapers (58-59) which he fully described (60).

The wrench was further described by the respondent's witness, Hansen, the pumpman, as an open end, one and five-eighths inch, made of a spark-proof alloy and weighing two and one-half pounds (69).

Hansen admittedly did not show Michalic how to use the tool (60), nor did he watch the petitioner work (70), although he knew that he was a fireman and had no knowledge of the pumproom, of the tools to be used or of the work demanded of him.

Hansen stated that the three wrenches of the same type (73) were five years old and had been in use for the five years (74). The witness explained that the tools which were not made of steel (78) but of a special spark-proof alloy (79), had not been inspected for nine months prior to their use by the petitioner (79).

At the close of respondent's case the Trial Court granted the motion to dismiss the complaint (98).

Petitioner appealed from the order of dismissal, which was affirmed by the Court below on October 29, 1959.

SUMMARY OF ARGUMENT

A determination by this Court, upon an examination of all the evidence, that a material issue of fact existed would require a reversal of the District Court grant of a directed verdict and its affirmance by the Court of Appeals.

The District Court determined that the description of the wrench testified to by the petitioner and witnesses was physically insufficient to present the jury with the question as to whether the petitioner was given a reasonably safe working tool and also, whether under the doctrine of seaworthiness the wrench was reasonably fit for the purpose intended.

The District Court further factually determined that all the evidence led to the conclusion that the petitioner was afforded a safe place to work and further, that the conceded lack of instruction and supervision by petitioner's superior with knowledge that petitioner was inexperienced in the work and unaccustomed to the area did not present question of fact for the jury.

The Court of Appeals affirmed on the ground that the descriptive testimony of the wrench afforded no basis for the jury to determine whether the wrench was reasonably safe. As such, the Court of Appeals restricted the common meaning to be given to testimony, supposedly to be examined in a light most favorable to the petitioner, so as to destroy the causal relation between the defects testified to and the accident and injury. The Court further failed to determine petitioner's right under the general maritime law as to whether the wrench was reasonably fit for the purpose intended.

The Court of Appeals erred in determining the issue of fact as to whether petitioner was afforded a safe place to work. The question was one which should have been properly submitted to the triers of the facts, which duty was usurped by the District Court and again by the Court of Appeals.

Further, the Court of Appeals failed to determine whether the conceded failure by petitioner's superior to instruct and supervise the work under all the circumstances gave rise to liability.

The Court below erred in determining that the error of the District Court in rejecting testimony going to the very heart of the descriptive testimony of the wrench, testimony which the petitioner could have elicited except for the District Court's decision, was not harmful or prejudicial.

Again, the Court of Appeals failed to properly evaluate the enormity of the error of the District Court's insistence upon an absolute compliance with the language of the complaint, although lack of surprise was conceded, in view of

the obvious antagonistic attitude of the District Court, and the fact that the District Court in effect predicated the dismissal upon the lack of proof conforming to the language of the complaint.

ARGUMENT

POINT I

The Courts below committed error in granting (and affirming) respondent's motion for a direct verdict in holding that:

(a) no issue of fact existed as to whether petitioner was afforded working tools reasonably safe and fit for the purpose intended on the sole basis of self-determination of meaning and weight to be given to descriptive testimony by each witness;

(b) no issue of fact existed as to whether petitioner was afforded a reasonably safe place to work;

(c) no issue of fact existed as to whether petitioner was given proper instruction and supervision under all the prevailing circumstances, in order to carry out his duties.

The decisions of the Courts below are in direct conflict with innumerable decisions of this Court which have assiduously resisted the efforts of Trial and Appellate Judges to usurp injured plaintiffs' constitutional right to a trial by jury. The instant case has not only destroyed that right but has done so with little or no regard for basic propositions of law as laid down by this Court.

This Court has had recent cause, on several occasions, to brake the tendency of lower Courts to trespass upon the province of the triers of the facts. Those decisions by this Court, have been in aid of plaintiffs in personal injury cases who were deprived of that constitutional right by Judges who refused to assess the respective causes in the light of modern, liberal, judicial procedure and concept

of substantive law, effectively destroying the claims of persons torn in body and spirit, the unfortunates of our industrial behemoth. The admonition by this Court that inroads upon the jury's province would not be tolerated has herein again been disregarded. *Schulz* v. *Pennsylvania*, 350 U. S. 523; *Rogers* v. *Missouri*, 352 U. S. 500; *Ferguson* v. *Moore-McCormack*, 352 U. S. 521; *Webb* v. *Illinois*, 352 U. S. 512; *Arnold* v. *Panhandle*, 353 U. S. 360; *Shaw* v. *Atlantic*, 353 U. S. 920; *Futrelle* v. *Atlantic*, 353 U. S. 920; *Deen* v. *Gulf*, 353 U. S. 925; *Thompson* v. *Texas*, 353 U. S. 926; *Ringhiser* v. *Chesapeake*, 354 U. S. 901; *Gibson* v. *Thompson*, 355 U. S. 18; *Stinson* v. *Atlantic*, 355 U. S. 62; *Honeycutt* v. *Wabash*, 355 U. S. 424; *Butler* v. *Whiteman*, 356 U. S. 271. See also: Chief Judge Clark's dissenting opinion in *Filipek* v. *Moore-McCormack*, 258 F. 2d 734 (2nd Cir.).

This Court has consistently declared that the existence of a material issue of fact would preclude a directed verdict. As such, the Court below was in error if this Court now determines from an examination of all the evidence that an issue of fact existed, that fair-minded men *could* have found respondent negligent or its vessel unseaworthy.

This Court has, in various decisions, discussed the question of submission of the issues when controverted or even uncontroverted evidence was presented. In *Gunning* v. *Cooley*, 281 U. S. 90; *Tiller* v. *Atlantic*, 318 U. S. 54; *Tennant* v. *Peoria*, 321 U. S. 29; *Lavender* v. *Kurn*, 327 U. S. 645, the Court pointed out that uncertainty of negligence, arising from a choice of conflicting evidence, or undisputed evidence giving rise to possible different conclusions, was within the jury's province of determination, that the jury weighed contradictory evidence and inferences, judged credibility of witness and drew ultimate conclusions as to the facts although it involved some speculation and conjecture in order to settle the dispute. Further, Courts were not free to reweigh the evidence and set aside jury verdicts

merely because the Judges felt that other results were more reasonable.

In *Schulz* v. *Pennsylvania*, 350 U. S. 523, *supra*, on appeal from a directed verdict for the defendant and affirmation thereon; this Court laid down the principle of law governing the "directed verdict" in cases grounded upon the Federal Employers' Liability Act, 45 U. S. C. § 51, and the Jones Act, *supra*. Pointing out the impossibility of establishing the negligence of a party by direct, precise evidence and concluding that determination of the facts must be left to the jury where there were conflicting inferences and conclusions to be drawn from the evidence prsented, the Court stated:

> "In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. '[W]e think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445 (1888).
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> In this case petitioner is entitled to recover if her husband's death resulted in 'whole or in part' from defendant's negligence. Fair-minded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And reasonable

> men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. But the courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences. For 'The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn" (pp. 525-526).

In *Rogers* v. *Missouri*, 352 U. S. 500, *supra*, this Court again set down the test to be applied in an action based upon the Federal Employers' Liability Act and the Jones Act. The Court reviewed the evidence which had resulted in a jury verdict for the plaintiff and a reversal by the Supreme Court of Missouri upon the ground the evidence did not support the findings and declared:

> "We may assume that the jury could properly have reached the court's conclusion. But, as the probative facts also supported with reason the verdict favorable to the petitioner, the decision was exclusively for the jury to make. The jury was instructed to return a verdict for the respondent if it was found that negligence of the petitioner was the sole cause of his mishap. We must take it that the verdict was obedient to the trial judge's charge and that the jury found that such was not the case but that petitioner's injury resulted at least in part from the respondent's negligence.

The opinion may also be read as basing the reversal on another ground, namely, that it appeared to the court that the petitioner's conduct was at least as probable a cause for his mishap as any negligence of the respondent, and that in such case there was no case for the jury. But that would mean that there is no jury question in actions under this statute, although the employee's proofs support with reason a verdict in his favor, unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected, or, stated another way, unless his proofs are so strong that the jury, on grounds of probability, may exclude a conclusion favorable to the defendant. That is not the governing principle defining the proof which requires a submission to the jury in these cases. The Missouri court's opinion implies its view that this is the governing standard by saying that the proofs must show that 'the injury would not have occurred but for the negligence' of his employer, and that '[t]he test of whether there is causal connection is that, absent the negligent act the injury would not have occurred.' That is language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury.

Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The

statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence. (Italics added.)

The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.

The Congress when adopting the law was particularly concerned that the issues whether there was employer fault and whether that fault played any part in the injury or death of the employee should be decided by the jury whether fair-minded men could reach these conclusions on the evidence. Originally, judicial administration of the 1908 Act substantially limited the cases in which employees were allowed a jury determination. That was because the courts developed concepts of assumption of risk and of the coverage of the law, which defeated employee claims as a matter of law. Congress corrected this by the 1939 amendments and removed the fetters which hobbled the full play of the basic congressional intention to lease to the fact-finding function of the jury the decision of the primary question raised in these cases—whether employer fault played any part in the employee's mishap." (pp. 504-509)

In *Ferguson* v. *Moore-McCormack*, 352 U. S. 521, *supra*, an appeal from a jury verdict for the plaintiff reversed on the ground that a directed verdict should have been granted, this Court again reviewed the evidence and found it sufficient to submit it to the jury on the question of negligence.

"Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a pre-eminent role in these Jones Act cases (*Jacob* v. *New York City*, 315 U. S. 752; *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523), could conclude that petitioner had been furnished no safe tool to perform his task. It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream. On this record, fair-minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him. See *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523, 526. Since the standard of liability under the Jones Act is that established by Congress under the Federal Employers' Liability Act, what we said in *Rogers* v. *Missouri Pacific R. Co.*, *ante*, p. 500, decided this day, is relevant here:

> 'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'

Because the jury could have so concluded, the Court of Appeals erred in holding that respondent's motion for a directed verdict should have been granted. 'Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function.' *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62." (pp. 523-524)

Mahnich v. *Southern*, 321 U. S. 96, fully discussed the historical background of the rights of seamen in affirming the correct application of the doctrine of seaworthiness, independent of negligence theories. In ruling that the seaman was entitled to recovery, the Court declared:

> "The staging from which petitioner fell was an appliance appurtenant to the ship. It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used, because of the defective rope with which it was rigged. Its inadequacy rendered it unseaworthy, whether the mate's failure to observe the defect was negligent or unavoidable. Had it been adequate, petitioner would not have been injured and his injury was the proximate and immediate consequence of the unseaworthiness." (p. 103)

Alaska v. *Petterson*, 205 F. 2d 478, aff'd 347 U. S. 396, involved a longshoreman injured by a defective block brought aboard the vessel by his employer, the stevedoring company. In distinguishing the doctrines of seaworthiness and negligence, stating that seaworthiness was a "specie of strict liability regardless of fault", the Court declared, "It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists" (p. 479).

The test of sufficiency of evidence for jury submission is whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, or that the shipowner failed to provide a seaworthy vessel in producing the injury or death for which damages are sought, *Rogers* v. *Missouri*, 352 U. S. 500, *supra*; *Mahnich* v. *Southern*, 321 U. S. 96, *supra*; to be viewed in a light most favorable to the plaintiff. *Bailey* v. *Central*, 319 U. S. 350; *Casey* v. *Seas*, 178 F. 2d 360; *Willoughby* v. *Safeway*, 198 F. 2d 604; *Conry* v. *Baltimore*, 112 F. Supp. 252, aff'd 209 F. 2d 422; *Giliberto* v. *Fellow*, 177 F. 2d 237; *Banks* v. *Associated*, 161 F. 2d 305.

Petitioner submits that the facts introduced gave rise to the conclusion that the jury *could* have found in the plaintiff's favor, either under the concept of negligence liability or the doctrine of seaworthiness, that the test applied by the Courts below did not afford petitioner his constitutional right to a submission to the jury of the facts, presumptions and inferences fairly drawn therefrom. As such, the Trial Court and the Court of Appeals committed reversible error.

(a) An issue of fact existed as to whether petitioner was afforded working tools, reasonably safe and fit for the purpose intended.

The District Court dismissed the action at the close of the evidence on the novel theories, *inter alia*, (1) that no jury question was presented as to whether the petitioner was afforded a safe tool with which to work, ignoring the compelling discussion by this Court in *Jacob* v. *New York*, 315 U. S. 752, that a question of fact was always presented as to whether a tool was reasonably safe and suitable for its purpose;[4] (2) that no jury question was

[4] The shipowner has the duty to provide seamen with a safe place to work under the Jones Act, which included safe equipment to perform his duties, *Ferguson* v. *Moore-McCormack*, 352 U. S. 521; *supra*; *Schulz* v. *Pennsylvania*, 350 U. S. 523, *supra*; *Jacob* v. *New York*, 315 U. S. 752; *supra*; *Arizona* v. *Anelich*, 298 U. S. 110. In *Jacob* v. *New York*, *supra*, this Court unequivocally destroyed the applicability of the defense of the simple-tool doctrine in cases under the Jones Act, holding that the legislative intent to broaden the rights of seamen would be inconsistent with any policy relieving the master of a vessel from the primary duty to inspect and provide safe tools. The Court concluded by strongly stating that applicability of the defense doctrine after notice of the defect, would be a perversion of the Act, that the doctrine could never justify the withdrawal of the question of negligence from the jury, that only the triers of the facts could determine whether the shipowner, with notice of the defect, was negligent in failing to comply with the request for a new tool. See also: *Sawyyer* v. *California*, 147 F. Supp. 324.

The question arose as to whether respondent's duty, under either theory of law, extended to simple-tools and, further, whether the exclusionary simple-tool doctrine was applicable in this matter. The District Court, despite the clear language of this Court in *Jacob* v. *New York* that the simple-tool doctrine was not applicable as a defense in Jones Act cases because of the inability of seamen to control conditions aboard ship, that the question of whether a defective tool was provided was always one for the jury, held *Jacob* inapplicable (98) on the theory that this Court had held only that notice of the defect in *Jacob* was established by protest of the defective tool three times in three weeks. The District Court mentioned the fact that the description of the wrench in *Jacob* was more complete than in the case at bar, which would have gone only to the

presented as to whether the space in which petitioner had to work constituted an unsafe place to work, (3) disregarding the fact that petitioner, known to be totally inexperienced in the work, was ordered into the area with-

weight of the evidence for the jury's consideration. At various times the working end of the wrench was described as "chewed up", "battered", "beaten", "worn". A full description was given as to material, size and shape. The District Judge commented that the tool worked well until the accident, a conclusion contrary to the evidence. Petitioner explained that the wrench slipped continuously, not only at the time it struck his foot. Would the Court not have directed the verdict if the tool had struck petitioner's foot while he was taking off the first or second nut? Apparently the Court reasoned that even if Michalic escaped injury using a defective tool when taking off sixteen nuts, though suffering an injury while removing the seventeenth, the presumption of non-defect was conclusive.

The Trial Court erroneously took upon itself the jury's right of reconciling conflicting evidence in determining the weight to be given the testimony as shown by its several expressions that Hansen's testimony concerning the condition and use of the tool was probably correct (97-98). As such, the Court ignored petitioner's testimony, the testimony that it erroneously struck from the record and the testimony of respondent's witness who stated only that the tool was used in the pumproom, that the casing was removed for repairs twice each year. The Court further failed to consider the obvious fact that Hansen, not the only pumpman aboard the vessel, could not possibly know of every use of the tool during the times he was off duty.

The statement by Hansen that there were three wrenches of the same size available, that he gave Michalic "a wrench" (69) strongly belied his testimony of a specific wrench for a specific pump. The date of purchase of the wrench, its employment by the respondent and its condition at the time of petitioner's injury were all testified to by petitioner and the various witnesses. Petitioner submits that the evidence was highly controversial and should have been considered only by the jury—the triers of the facts.

The witnesses agreed that the wrench was made of "non-sparking" bronze. That very property of the metal that made it non-sparking could well have caused it to be battered, beaten, chewed up condition after years of use when coupled with the fact that the wrench had to be constantly struck with a mallet, the force of the blows directed to the inner-jaw area of the wrench gripping the tight steel nuts.

out instruction in the use of the special tools involved and without supervision in the work operation. As such the Trial Judge took upon himself the determination of all the questions of fact which should have been left to the jury and after coming to his decision on each question, announced that none were left for the submission of the case to the jury and dismissed the cause.

In the Court below, the decision turned on whether petitioner had sufficiently described the tool's defect in order to establish the causal relationship between the condition of the wrench and its slipping.

It is submitted that the description of the wrench was in no manner inadequate or insufficient. The terms used to detail its condition presented a picture that the jury could readily envision.[5] To hold otherwise was to put an onerous burden of minutely examining and explaining every scratch, chip, dent and deviation in the tool, an insurmountable demand upon the petitioner who worked with the tool for part of one morning in December, 1955. Suffice to say that

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[5] The testimony was couched in terminology commonly used by men in the industry, perhaps without the elegance of those more educated to the full bloom of our language but, nevertheless, of sufficient clarity to unmistakably locate the defective section of the wrench, to explain its characteristics and the results born of its use. It would appear that the Court below was concerned more with semantics (still to be viewed most favorably to petitioner) than with the merits of the cause.

The Courts below were quick to point out the lack of teeth in the wrench (to nobody's surprise). How could they, at the same time, have properly concluded that the pleadings and all the testimony concerning the description of the defect in the wrench were directed to any part of the tool other than the gripping area (98). That area was open and without teeth, it is true, but it was still the gripping area that was claimed to be defective. No amount of strained interpretation of testimony by the Courts below can negate the very obvious conclusion that this cause of action was predicated upon a claim of a worn wrench which, by slipping off the work, failed to properly perform the function for which it was intended.

its condition was poor, the inside jaw area damaged to such an extent that the tool constantly slipped off; hence was not reasonably safe. The evidence introduced presented a very common condition, a tool box for a large pumproom containing various machines which required periodic check-ups and most certainly some repair over the years, for which tools were available. The thought that each machine had its own wrench that each pump casing had its own wrench, which was never used for any other purpose is incredible and not worthy of belief.

Not present in *Jacob* v. *New York*, 315 U. S. 752, *supra*, but available to the petitioner herein was a cause of action under the general maritime law for the unseaworthiness of the vessel.

Since *The Osceola*, 189 U. S. 158, it has been a settled rule of law that the vessel and its owner are liable to indemnify a seaman for injury caused by unseaworthiness of a vessel or its appliances.

Mahnich v. *Southern*, 321 U. S. 96, *supra*, involved a seaman ordered to paint the bridge of the vessel. The rope used to sustain the scaffold was defective, broke and caused the injuries for which the seaman sued. Liability was found by the Court on the ground that the scaffold was unseaworthy as inadequate for the purpose for which it was intended, a specie of strict liability, irrespective of fault, non-delegable and unlimited by any negligence concept.

Alaska v. *Petterson*, 205 F. 2d 478, aff'd 347 U. S. 396, *supra*, again affirmed the doctrine of seaworthiness as first laid down by this Court in *The Osceola*, 189 U. S. 158, *supra*, extended to longshoremen in the case of *Seas* v. *Sieracki*, 328 U. S. 85, and to repairmen in *Pope and Talbot* v. *Hawn*, 346 U. S. 406. In *Petterson*, a longshoreman was injured by a defective block brought aboard by his em-

ployer, the stevedoring company. The Court of Appeals, 205 F. 2d 478, affirmed by the Supreme Court, 347 U. S. 986, distinguished the doctrines of seaworthiness and negligence stating that seaworthiness was "specie of strict liability regardless of fault." The Court declared (p. 479):

> "If the block was being put to a proper use in a proper manner, as found by the district judge, it is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy.
>
> In making this inference we do not rely upon the tort doctrine of res ipsa loquitur, although the result is similar. Res ipsa loquitur is a doctrine of causation usually applied in cases of negligence. Here we are dealing with a specie of strict liability regardless of fault. Seas Shipping Co. v. Sieracki, supra, 328 U. S. at page 94, 66 S. Ct. 872. It is not necessary to show, as it is in negligence cases, that the shipowner had complete control of the instrumentality causing the injury, see O'Mara v. Pennsylvania R. Co., 6 Cir., 95 F. 2d 762; or that the result would not have occurred unless someone were negligent, see Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365. It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists. Mahnich v. Southern S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561. That has been shown here."

In the *Petterson* case, *supra; Rogers* v. *United*, 205 F. 2d 57, rev'd 347 U. S. 984; *Boudoin* v. *Lykes*, 348 U. S. 336; *Mitchell* v. *Trawler*, 362 U. S. 539, this Court decisively negated the thought that liability, predicated upon the duty to provide a seaworthy vessel, was dependent upon the negligence doctrine of notice. See also: *Poignant* v. *United States*, 225 F. 2d 595.

Cox v. *Esso*, 247 F. 2d 629, involving the proper use of a block and tackle, was appealed on the issue of the charge

by the Trial Court of contributory negligence. The Court of Appeals reversed and stated:

> "Whether Cox had the same opportunity to select equipment, whether he could or ought in prudence to have picked the gear out himself, whether he had any right or prudent duty to decline to use unsuitable gear, whether he should have carried a protest to the master, were questions which, again, had to be resolved in the actual atmosphere of that calling.
>
> [6] All of this was, of course aggravated by the error of law in this charge. Putting on the seaman, as it did, the burden of selecting gear, appliances and tackle to be used, or inspecting that furnished by the vessel to ascertain whether it was suitable, it was a virtual abandonment of the traditional notions, long expressed, that the vessel is under an absolute duty to supply and keep in order tools and appliances, must furnish a seaworthy ship and seaworthy appliances. The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760; Mahnich v. Southern S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561, 1944 A. M. C. 1; Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, 1946 A. M. C. 698. The obligation to furnish the gear was on the vessel. The bosun undertook to furnish it. If through the bosun the shipowner did not comply with the heavy obligation to provide seaworthy equipment, it was not the duty of the seaman to select it or pick from the good and bad. This does not free the seaman from the continuing requirement of prudent conduct for improper use of faulty or unseaworthy equipment may present a question of the seaman's responsibility. This is true even in a claim for unseaworthiness as 'The right is in the nature of liability without fault for which contributory negligence is not a bar to recovery, although it may be relevant in assessing the damages * * *' concurring opinion of Mr. Justice Frankfurter, Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, at page 415, 74 S. Ct. 202, at page 208, 98 L. Ed. 143, at page 154, 1954 A. M. C. 1, at page 11. But the failure of the shipowner to comply with its heavy obligation to select and furnish seaworthy appli-

ances cannot be thus turned into a fault by the seaman." (pp. 635-636)

* * *

"The objection was primarily that the court did not adequately portray the rigorous, inflexible, absolute character of the duty to supply and keep in order seaworthy appliances which the law, all admit, imposes. In view of another trial, we think it appropriate to point out that where, as is now so common, the seaman's case is for unseaworthiness and negligence under the Jones Act, the standards of each must be clearly distinguished.

[7, 8] One is an absolute duty, the other is due care. Where, as this charge did, the ultimate issue of seaworthiness of the gear was in terms of 'reasonably suitable' for the work intended, and other issues, such as defendant's negligence and plaintiff's contributory negligence and the distinctly unnautical form of 'unavoidable accident' speak in terms of due care, i.e., what a reasonably prudent person would do, there is a great hazard that the jury will get the impression that all is to be tested by one gauge. Of course, that is not so. The owner has an absolute duty to furnish reasonably suitable appliances. If he does not, then no amount of due care or prudence excuses him, whether he knew, or could have known, of its deficiency at the outset or after use. In contrast, under the negligence concept, there is only a duty to use due care, i.e., reasonable prudence, to select and keep in order reasonably suitable appliances. Defects which would not have been known to a reasonably prudent person at the outset, or arose after use and which a reasonably prudent person ought not to have discovered would impose no liability." (pp. 636-637)

The ruling by this Court of the inapplicability of the nple-tool doctrine in cases arising under the Jones Act nstituted a further affirmation of the rejection of the mmon law defense of assumption of the risk, that primary duty of the master to furnish a reasonably

safe place to work could be neither qualified nor limited by the discredited doctrine of warning only of latent defects.[6] See also: *Coast* v. *Brady*, 8 F. 2d 16; *Green* v. *Orion*, 139 F. Supp. 431.

The Court below destroyed this cause of action not on judicial precedent but simply by interpreting the testimony describing the defective condition of the tool and determining the issues of fact by application of that self-determined, strained interpretation of language to so weaken the causal relation of the condition to the accident that the vitality of the testimony was sapped beyond recognition. That method, petitioner submits, destroyed the yardstick employed to determine whether testimony gave rise to a ques-

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[6] Michalic was bound to obey the orders of his superior aboard the vessel and to accept the tool offered him for the work and the conditions of the work area as he found them.

In *Darlington* v. *National*, 157 F. 2d 817, wherein a seaman was ordered to work with a known defective spray gun and without a mask, the Court reversed the Trial Court for its refusal to charge the jury as follows:

> "The plaintiff was bound to obey the orders of his superiors on board the vessel. The chief officer was the plaintiff's superior and plaintiff was bound to obey the orders of the chief officer. Even though the orders of the chief officer required him to work with unsafe tools or under unsafe conditions, the plaintiff was obliged to obey the orders and did not assume any risk of obedience to orders" (p. 819).

See also: *United States* v. *Boykin*, 49 F. 2d 762; *Tampa* v. *Jorgensen*, 93 F. 2d 927; *Masjulis* v. *United States*, 31 F. 2d 284; *Armit* v. *Loveland*, 115 F. 2d 308.

As such, there was no assumption of risk since Michalic carried out the orders of his superior officer and was injured while performing his duty. Negation of the defense goes even to known defects in equipment or hazardous conditions in view of the demands upon a seaman to follow the orders of a superior.

tion of fact for the jury." As such, the decision of the Court below, although couched in other terms, was in reality a usurpation of the jury's function to determine the clear meaning of the testimony in arriving at a reasonable verdict. If a Trial Court may invest itself with the autocratic power to modify the accepted and widely held view of the meaning to be given to testimony, we have seen the end of trial by jury.

The many cases holding that a Trial Court should rule on the sufficiency of evidence in a light most favorable to the plaintiff, *Bailey* v. *Central*, 319 U. S. 350, *supra*; *Schulz* v. *Pennsylvania*, 350 U. S. 523, *supra*, have been unashamedly violated by the decision of the Court below. Certainly, the rule carries with it a corollary statement that the individual words of that testimony must be given their widest possible meaning in order to realistically afford the plaintiff the benefits set forth above. The loss of that benefit to petitioner herein in determining the dismissal motion and in like manner at the level of Appellate review resulted in the totality of the jury function in the Trial Court instead of the mere determination of the existence of a material issue of fact.

Michalic and the witnesses described the wrench as old, beatened, battered and chewed up. It was further described as slipping off every nut as each was loosened in turn. Can there be any doubt but that petitioner was referring to the jaw of the wrench failing to properly grip the nuts because of the defective condition which caused the wrench to slip off when struck on the handle with the lead mallet.[8]

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[7] The well-settled rule of law that evidence is to be reviewed in a light most favorable to the plaintiff can now (as a result of the decision of the Court below) be systematically emasculated by a Court not satisfied with a particular cause by simply evaluating the testimony under a self-imposed interpretation and then determine that the language employed by witnesses fell short of sufficient evidence to establish causal relation.

[8] Can the Court below have thought that petitioner and the witnesses were referring to the handle of the wrench? How could such a condition have caused the wrench to slip off the nuts? By what method could the Court below have conceived of petitioner bringing the cause of action if such was his intent to show only that a handle of a wrench, not coming into contact with the nuts, was old, battered and beaten.

Petitioner respectfully submits that it was absurd for the Court below to even harbor the thought that any of the voluminous testimony describing the condition of the tool was directed to any part of the wrench other than the jaw area coming into contact with the steel nuts.

In like manner, the respondent would also be liable for failing to provide the petitioner with a seaworthy vessel. *Mahnich* v. *Southern*, 321 U. S. 96, *supra*; *Seas* v. *Sieracki*, 328 U. S. 85, *supra*. The question of existence of a defective wrench, its use resulting in the accident, was again a question of fact for the jury. The District Court failed to consider the question at all in dismissing the cause. The Court below, again interpreting the testimony and usurping the jury's function failed to find that causal relationship between the condition of the wrench and the accident. Again, petitioner submits that the Court below committed error.

(b) An issue of fact existed as to whether petitioner was afforded a reasonably safe place to work.

The Court below stated that the insufficient lighting and cramped working space had nothing to do with the slipping of the wrench which was the immediate cause of petitioner's injury. That conclusion of fact may well have been correct, however, the question of whether the area was reasonably safe under all the circumstances set forth above and as described by the petitioner and the various witnesses was one of fact for the jury and should not have been answered by either the District Court or the Court of Appeals. The District Court made its determination by an inspection of photographs and by deciding if the experienced pumpman, Hansen, could get to his pump, Michalic should have been able to get to his, ignoring the fact that the claim was not that Michalic could not get to it but that the closeness of the area rendered it difficult to do the work and caused it to be unsafe (the record devoid of any proof that the area about the other pump was the same as the one upon which Michalic worked).

Bailey v. Central, 319 U. S. 350, *supra*, in which this Court reversed a directed verdict in the suit under the Federal Employers' Liability Act, involved a railroad worker, comparatively inexperienced, who was thrown to his death operating a wrench in a narrow space alongside a cylinder car during an unloading operation. Holding that the failure to provide the deceased with a safe place to work would give rise to liability, that it was a jury question as to whether the area and conditions under all the circumstances was safe, the Court declared:

> "There was in our view sufficient evidence to go to the jury on the question whether, as alleged in the complaint, respondent was negligent in failing to use reasonable care in furnishing Bailey with a safe place to do the work.
>
> Sec. 1 of the Act makes the carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees.' The rights which the Act creates are federal rights protected by federal rather than local rules of law. *Second Employers' Liability Cases*, 223 U. S. 1; *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492; *Chesapeake & Ohio Ry. Co.* v. *Kuhn* 284 U. S. 44. And those federal rules have been largely fashioned from the common law (*Seaboard Air Line Ry.* v. *Horton*, *supra*) except as Congress has written into the Act different standards. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54. At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. 3 Labatt, Master & Servant (2d ed.) § 917. That rule is deeply engrained in federal jurisprudence. *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 664, and cases cited; *Kreigh* v. *Westinghouse & Co.*, 214 U. S. 249, 256, 257; *Kenmont Coal Co.* v. *Patton*, 268 F. 334, 336. As stated by this Court in the *Patton* case, it is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonable-

ness of the care—reasonableness depending upon the danger attending the place or the machinery.' 179 U. S. p. 664. It is that rule which obtains under the Employers Liability Act. See *Coal & Coke Ry. Co.* v. *Deal*, 231 F. 604; *Northwestern Pacific R. Co.* v. *Fiedler*, 52 F. 2d 400; *Thomson* v. *Boles*, 123 F. 2d 487; 2 Roberts, Federal Liabilities of Carriers (2d ed.) § 807. That duty of the carrier is a 'continuing one' (*Greigh* v. *Westinghouse § Co., supra*, p. 256) from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent.

The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue (*Tiller* v. *Atlantic Coast Line R. Co., supra*) as well as issues involving controverted evidence. *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445; *Washington & Georgetown R. Co.* v. *McDade*, 135 U. S. 554, 572. To withdraw such a question from the jury is to usury its functions.

The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' *Jacob* v. *New York City*, 315 U. S. 752. It is part and parcel of the remedy afforded railroad workers under the Employers Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method

of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

Beadle v. Spencer, 298 U. S. 124, held that failure to provide safe appliances or a safe place to work was actionable under the Jones Act, further that the failure to supply and keep in order the proper appliances appurtenant to the ship rendered the vessel unseaworthy.

The Court below in *Interocean v. Topolofsky*, 165 F. 2d 783, clearly characterized the duty to the shipowner toward the crew of its vessel in holding that the question of absence of bolts holding the stairway and giving rise to liability was for the jury:

"[1] Appellee is a seaman who was injured during a voyage and brought suit under the Jones Act, 46 U. S. C. A. § 688, charging appellant with negligence causing the injury. Appellant denied that there was any evidence of negligence on its part. The injuries resulted from an allegedly defective step on a flight of steps on appellant's ship. The step in question was held in position by being bolted on each side to uprights. It was supported by four bolts, two on each side of the step—one in the front part of the step, and the other, in the rear. Looking at the step from the front, there were, then, two front bolts, one at the right side and the other at the left side of the step, and two rear bolts. Appellee claimed that as he was going down the flight of steps, he stepped on one of them which gave way, or tipped, and caused him to fall to the fire hold. When he recovered from the fall, according to his testimony, he went back and examined the step, and found that the two front bolts were out and that there was,

therefore, nothing to hold up the front of the step. Appellee's testimony was the sole evidence of the defect in the step, and was strongly challenged and contradicted by witnesses for appellant. Whether such defect existed, and, if it did, whether appellant knew of, or should have known of, or discovered, this dangerous defect in the step, was a question for the jury.

[2] The obligation of a shipowner to his seamen is substantially greater than that of an ordinary employer to his employees. Koehler v. Presque-Isle Transportation Co., 2 Cir., 141 F. 2d 490, 492. Appellant had the duty of furnishing appellee a safe place in which to work and was responsible for a seaworthy ship and safe equipment. This duty is absolute and not merely a result of the Jones Act. Roberts v. United Fisheries Vessels Co., 1 Cir., 141 F. 2d 288. '* * * seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of the rules of the common law which would affect them harshly because of the special circumstances attending their calling.' Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, 431, 59 S. Ct. 262, 266, 83 L. Ed. 265. 'The rules, peculiar to admiralty, of liability for injuries to seamen or others, are as applicable where the injury occurs upon a vessel in port as when at sea, although the common law may apply a different rule to an injury similarly inflicted on the wharf to which the vessel is moored.' Beadle v. Spencer, 298 U. S. 124, 129, 56 S. Ct. 712, 714, 80 L. Ed. 1082." (pp. 783-784)

The Secandbee, 102 F. 2d 577, was a reversal by the Court below of a decree for the respondent in a matter involving the question of safety in a working area. The Court declared:

"[11, 12] It is the duty of a shipowner or master to supply a seaworthy vessel for its employees and this does not depend on the exercise of reasonable care, but is absolute. The H. A. Scandrett, 2 Cir.,

87 F. 2d 708. A seaman does not assume the risk of injury even from obvious dangers if the proximate cause thereof is the failure of the shipowner or master to supply and keep in order proper appliances appurtenant to the ship and the same rule applies for failure to provide a safe place in which to work. Cleveland-Cliffs Iron Company v. Martini, 6 Cir., 96 F. 2d 632; Socony-Vacuum Oil Company v. Smith, 305 U. S. 424, 59 S. Ct. 262.

[13] The uncontroverted evidence in the case at bar shows that the pump with its rapidly moving and unguarded parts was located on one side of a narrow passageway directly opposite a guarded revolving fan and further shows that had the pump been guarded the libellant would not have fallen into it. This constituted an unsafe place in which to work and made the ship unseaworthy, and was the proximate cause of his injury." (p. 581)

Hanson v. *Luckenbach*, 65 F. 2d 457, involved the question of whether a safe place to work was afforded the seaman who was ordered to raise a chain hanging over the side of the vessel from a cramped area due to deck cargo. The Court, holding the issue to be one of fact for the jury, stated:

"[1, 2] The action is brought under the Jones Act (section 33 [46 U. S. C. A. § 688]), which gives the plaintiff all the rights of railway employees. Among these is a reasonably safe place in which to work. Zinnel v. U. S. S. B. E. F. Corp., 10 F. (2d) 47 (C. C. A. 2); The Valdarno, 11 F. (2d) 35 (C. C. A. 5); Howarth v. U. S. S. B. E. F. Corp., 24 F. (2d) 374 (C. C. A. 2). It appears to us that a jury might find it unsafe for a man to try to pull up so heavy a chain in such cramped quarters. The deck load rose behind him higher than his head; he was obliged to stoop or crouch in order to get proper resistance to the weight he was to overcome. Had he stood upright, it might have pulled him overboard; at least a jury might think so. But a space of only one foot, or even two, is too narrow, if indeed possible at all,

for that purpose. Unless he assumed the risk of working there, he may complain that he was not properly provided. It is true that his testimony leaves it somewhat doubtful how far his position was the cause of his losing hold. At one time he attributed the accident to the narrow space he worked in; at another to the fact that, as he piled the chain in the space behind him, it slipped off. The narrowness of the working space would account for either, and a jury might find that it was the cause, whichever way he lost his grip upon the chain. The boatswain's order seems to us to have been inherently dangerous; nobody ought to be asked to do such a job in such a place, and we are not disposed to scrutinize too nicely the precise way in which the accident resulted.

[3] Being a seaman, it is well settled that the plaintiff did not assume any risks involved in obeying orders. Cricket S. S. Co. v. Parry, 263 F. 523 (C. C. A. 2); Panama R. R. Co. v. Johnson, 289 F. 964 (C. C. A. 2); Zinnel v. U. S. S. B. E. F. Corp., supra (C. C. A.), 10 F. (2d) 47; Holm v. Cities Service Co., 60 F. (2d) 721 (C. C. A. 2)." (pp. 457-458)

Ballard v. *Forbes*, 208 F. 2d 883, concerned a seaman found several feet from an open live switchboard beneath which wrenches were stored. Electric shock was among the possible factors leading to his death. Holding that speculation of cause of death was permissible, the Court stated that the issue of whether a safe place to work was provided was for the jury:

"[2] On the basis of the above and all the other evidence in the record we believe the jury could reasonably conclude that the defendants were negligent 'in whole or in part' with respect to Forbes. The location of the wrenches beneath the 'live' switchboard and the narrowness of the passageway between the 'live' switchboard and the generator would warrant the jury in finding that the defendants, in the words of the charge to which there were no exceptions: '* * * fail(ed) to exercise the care of an

ordinarily prudent shipowner with respect to the place that Forbes was to work and with respect to the appliances, either or both.' " (p. 886)

In *Howarth* v. *United States*, 24 F. 2d 374, the absence of a door hook to keep the door from opening was held to be a question of fact for the jury.

"The vital facts in this case were in dispute. Was the plaintiff, upon the occasion of the accident, engaged in opening the door, and, if so, was he furnished with such a defective appliance for keeping it open that the rolling of the vessel was likely to slam it suddenly and injure him, or was he closing the door, as the cook testified? If the latter, he should have kept hold of the door handle, and, had he done so, would have experienced no harm. The absence of the hook could not have affected him, if he had been shutting the door. Whether he was opening the door, and whether the only available appliance for holding it open was a safe and proper one, or whether he was closing the door, were all questions of fact for the jury.

It is argued that the fire brick was a safe door stop, and had worked well enough before; but a different inference may be drawn, and a jury ought to have been allowed to say whether the defendant should have maintained a hook on the door to hold it securely back, or whether the brick provided in place of the missing hook was a reasonably safe appliance, in view of the tendency of ships to pitch and roll in rough weather. The dismissal of the cause of action to recover indemnity was error. If the door without the hook was unsafe, the acts of defendants in furnishing an unsafe appliance would be negligent The Merchant Marine Act of 1920 allows recovery for negligence. 41 U. S. Stat. at Large, p. 1007 (46 U. S. C. A. § 688 [Comp. St. § 8337a]): * * * A jury must determine whether the absence of the hook rendered the door likely to slam and injure the plaintiff, so that his equipment and place to work were not proper—whether, in short, the defendants were negli-

> gent under the law of master and servant applicable to the situation disclosed in this case." (p. 376)

Matson v. *Hansen*, 132 F. 2d 487, was a further affirmation of the shipowner's duty to the crew of its vessel, varying with the prevailing conditions.

See also: *Sadler* v. *Pennsylvania*, 159 F. 2d 784; *Carr* v. *Standard*, 181 F. 2d 15; *Becker* v. *Waterman*, 179 F. 2d 713; *Nagle* v. *Isbrandtsen*, 177 F. 2d 163; *Johnson* v. *Griffiths*, 150 F. 2d 224; *Francis* v. *Seas*, 158 F. 2d 584; *Marceau* v. *Great Lakes*, 146 F. 2d 416; *Gardiner* v. *New York*, 146 F. 2d 420; *Pariser* v. *City*, 146 F. 2d 431; *Krey* v. *United States*, 123 F. 2d 1008; *Cleveland* v. *Martini*, 96 F. 2d 632; *States* v. *Berglann*, 41 F. 2d 456; *Zinnel* v. *United States*, 10 F. 2d 47; *Ross* v. *Zeeland*, 240 F. 2d 820, holding that the duty to provide a seaworthy vessel was absolute and nondelegable to make the ship reasonably fit to permit a seaman to perform his tasks with safety.

The question of due care in affording a reasonably safe place to work should have been submitted to the jury. Proximate cause did not have to be established by direct evidence but could have been proved by circumstances. *Sadler* v. *Pennsylvania*, 159 F. 2d 784, *supra*.

Michalic fully explained how he had to work. He demonstrated the position that he had to assume in order to carry out the order. The photographs further described the area. The jury could have concluded that the space was so insufficient, so cramped, the lighting so poor that the slippage of the wrench was caused, in part, by the lack of reasonably safe space in which to work. As such it was a question for the jury's determination.

The District Court answered the question and then announced that there was nothing for the jury to determine (97):

> "Counsel in his last discussion talked about how cramped the space was. Well, we have seen the photographs. It is not cramped to the point where he couldn't get at the casing; the other man got to his."

The record did not show that the pumps were in the same or similar positions.

Petitioner respectfully submits that the District Court, in failing to submit the question of whether Michalic was afforded a reasonably safe place to work, committed error, further that the Court of Appeals compounded the error.

(c) An issue of fact existed as to whether petitioner was given proper instruction and supervision under all the prevailing circumstances, in order to carry out his duties.

The Court below failed to consider whether the conceded lack of instruction to Michalic to carry out the orders in safety and the further absence of supervision by Hansen gave rise to liability.

The District Court, again determining the question of fact which it should have left for the jury's determination, disposed of the question as follows (97-98):

> "Counsel for plaintiff suggests, oh, he wasn't used to this, he was a fireman. Sure he is, but the testimony seemed to be part of the job when they lay-up and fit-out was to do the very work around this pump they were doing. Of course, he couldn't have had much experience doing it, nor would he need much. He was around the ship a few years and once a year they did the work, which is the reason why the wrench probably wasn't worn at all, probably was just as smooth as his immediate superior related."

Michalic had testified that he had never been in the pumproom and knew nothing about the work.

The shipowner has the non-delegable duty to man his ship with competent officers and crew. *United States* v. *Black*, 178 F. 2d 243; *In Re Pacific*, 130 F. 76; *The Drill Boat*, 233 F. 589. That competency extends to proper instruction for the correct performance of duty (both within and outside the scope of employment) and adequate supervision to assure reasonable safety in carrying out that performance.

Livanos v. *National*, 248 F. 2d 815, affirmed the jury's verdict for the plaintiff. He had been ordered with another crewman to remove pipe. An officer started talking to the other man holding the pipe which then fell on the plaintiff. The Court held that the jury could have found that the second crewmen negligently failed to hold the pipe, that the officer failed to supervise the pipe's removal, that the officer negligently failed to issue proper instructions and also failed to assign adequate numbers of men to perform the job safely.

Matson v. *Hansen*, 132 F. 2d 487, *supra*, was an affirmation of a judgment for the plaintiff. Heavy seas had disarranged deck cargo and had made the area hazardous. The order compelling the plaintiff to work that section of the vessel was held to have been negligently given. The test was held to be whether the order to the seaman to work in the area and in the manner required was one which would be given by a reasonably prudent officer.

Walker v. *United States*, 102 F. Supp. 618, affirmed on the District Court's opinion, 194 F. 2d 288, involved an order by a master placing the plaintiff and others in an admittedly dangerous area. Held that the master should have taken greater precautions and failed to use reasonable care for the safety of his men in not providing them with a safe place to work.

See also: *Menefee* v. *Chamberlin*, 176 F. 2d 828; *Stankiewicz* v. *United*, 229 F. 2d 580.

Michalic was ordered into an area unknown to him, totally inexperienced in the job he was required to do, using special tools in a cramped space and with poor lighting. Not only was it readily conceded that no instruction was given to him by Hansen but more, that no supervision was at anytime offered. Under the circumstances, considering that the evidence was to be considered in a light most favorable to the petitioner, was there not at least a question of fact for the jury's considerations as to

whether Michalic was afforded reasonable safety to carry out the orders of his superior.

As such, the Court below committed reversible error in failing to remand this cause to the District Court for a new trial.

POINT II

The Court below was in error in holding harmless:

(a) the Trial Court's rejection of descriptive testimony which would or could have dispelled that Court's pessimism as to sufficiency of the very evidence that became the basis for affirmance of the dismissal;

(b) the Trial Court's literal, narrow interpretation of the complaint as justification for granting the dismissal motion.

The Court below determined that the District Court did commit two errors but evidently did not consider them serious enough to call for a reversal. Petitioner respectfully submits that either one alone, and certainly both, constituted reversible error.

(a) The Trial Court's rejection of the descriptive testimony which would or could have dispelled the Court's reluctance as to sufficiency of descriptive evidence called for a reversal by the Court below.

The Trial Court erred in striking the testimony of Isenbach from the record (47) and negating the effect to be given to the evidence in view of the presumption of continuation of a condition in the absence of contrary proof.

The witness from his personal knowledge presented a scene of defective, unsuitable, unsafe, dangerous tools, in that condition for a lengthy period of time (41). He further described the pumproom area, position of the machinery and the lighting conditions prevailing at the place where Michalic was ordered to work. The Court struck his testimony solely because the witness left the vessel nine days before petitioner's accident. The proof was that the wrench used by Michalic was in the tool box for five years. There was no evidence of change in its condition during the nine days preceding the accident, or that it was even used during that nine days prior to its use by the petitioner.[9] As such, Isenbach's testimony was admissible, (when taken with the presumption) to show that the condition of the wrenches at the time of the accident was the same at the time he saw and used them.

There was no evidence introduced to show any change in the pumproom or in the condition of the tools between the time that Isenbach saw and knew of their condition and the date of the accident.

Wigmore on Evidence, Vol. 2, 3rd Edition, 1940, § 437, stated:

> "§ 437. (1) Existence, from Prior or Subsequent Existence; General Principles, applied in Sundry Instances (Highways, Machines, Buildings, Railway Tracks, etc.). When the existence of an object, condition, quality, or tendency at a given time is in issue, the *prior existence* of it is in human experience some indication of its probable persistence or continuance *at a later period.*
>
> The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end. The possibility of such circumstances will depend almost entirely on the nature of the specific thing

[9] Hansen testified that he hadn't inspected the tools in nine months, yet gave a wrench to Michalic.

> whose existence is in issue and the particular circumstances affecting it in the case at hand. * * * So far, then, as the *interval of time* is concerned, no fixed rule can be laid down; the nature of the thing and the circumstances of the particular case must control. (p. 413)
>
> * * *
>
> This general principle that a *prior* or *subsequent* existence is evidential of a later or earlier one has been repeatedly laid down, and has even been spoken of as a presumption. (p. 414)
>
> * * *
>
> The precedents show the principle applied to all manner of subjects—to the prior or subsequent condition of a highway, or of a bridge, or of a railway track, station, or roadbed, or of a stream, or of premises, without or within, or the condition of machinery, or apparatus. * * *" (pp. 414-416)

Zinnel v. United States, 10 F. 2d 47, *supra*, concerned the admission of a photograph of the area of an accident, taken some three or four days before the accident itself. Reversing the Trial Court's exclusion of the evidence, the Court declared:

> "The master and chief mate testified that such lines had been maintained on either side, during the whole voyage, for the protection of the crew, and to steady them while crossing. On the other hand, the plaintiff produced a member of the crew, who swore that on the morning of the accident, a few hours before it took place, and immediately thereafter, there was no line along the port side. To corroborate this he presented a photograph, taken three or four days earlier, showing the port side forward without any such line.
>
> The learned judge declined to receive the photograph, on the ground that it did not show the condition at the time of the accident.
>
> * * *

HAND, Circuit Judge (after stating the facts as above). [1, 2] The refusal of the court to allow the photograph in evidence for the purpose offered was erroneous. It was not necessary that the witness who took it should swear that it was correct at the exact moment of the accident, when he was not present. If it represented the truth in the morning, a few hours before, and at once after the accident, the jury was entitled to assume that there had been no change in the interim." (p. 48)

Verplanck v. *Morgan*, 90 N. E. 2d 872 (Court of Appeals, Ohio), involved a stove repaired by the landlord of the premises wherein the plaintiff was a tenant. A period of time had elapsed between the repairs and its subsequent use by the plaintiff. The Court cited and quoted with approval the text from *Wigmore on Evidence*, above set forth, in permitting the inference that the repair of the stove was repaired in a faulty manner, causing the explosion.

The Court below, in *Evans* v. *Erie*, 213 F. 129, involving a death which occurred at a railroad crossing, reversed a directed verdict for the defendant on the question of admissibility of evidence of a prior dangerous condition, previous accidents and near accidents at the crossing. In ruling the proof admissible, the Court stated:

"[3] 2. Proof of other accidents. The record is somewhat inartificial; but we think it should be construed as meaning that plaintiff offered to give evidence of other accidents and near accidents as before referred to, and that this offer was excluded and exception reserved. The rule is well settled in the federal courts that testimony of other accidents in the same place is admissible not only to show the dangerous character of the place, but also that knowledge thereof was brought to the attention of those responsible therefor. The alleged dangerous character of the crossing would naturally affect the question whether a given speed was negligent or not, as well as whether gates or flagmen were reasonably necessary. * * *

> We think testimony of accidents at this crossing from Erie southbound passenger trains should have been received, as well as proof of alleged complaints by the public authorities to the defendant subsequent to such accidents relating to the claimed dangerous character of the crossing with the request that gates or watchmen be maintained thereat. We think, also, that testimony of narrow escapes therefrom should have been admitted, so far as testimony should be produced tending to show notice to defendant thereof either by express information or general public notoriety." (pp. 133-134)

Baltimore v. *Felgenhauer*, 168 F. 2d 12, a wrongful death action for the death of a truck driver at a railroad crossing, affirmed the admissibility of evidence of the findings of the condition of the crossing on a date some two months before the accident by the State Commerce Commission engineers. The Court declared that the record disclosed no change in the condition, that the date was not so remote as to "render inapplicable the rule that a condition of a continuous nature shown to exist on the first date is presumed to exist on the latter in absence of proof to the contrary" (p. 17).

Woolworth v. *Seckinger*, 125 F. 2d 97, involved the question of introduction of testimony of a subsequent condition of a store floor as evidence of its condition at the time of the accident. The Court held that it was admissible in absence of evidence to the contrary, that its probative force and relevance went to its weight for the jury's consideration.

The Court below apparently (and correctly) reversed the Trial Court's exclusion of Isenbach's testimony, since it included that testimony in its discussion of the facts of the case in its opinion. In so doing, it is evident that petitioner was thus denied the opportunity of rebuttal testimony by Isenbach, which testimony could well have clarified any question of causal relation in the mind of the District

Judge. Having been deprived of such crucial testimony-l the Trial Court's erroneous rejection of the pivotal witnes the determination by the Court below that such incorre rejection of the witness was neither prejudicial nor harm ful to petitioner was itself reversible error.

(b) The Trial Court's literal, narrow interpretation of th complaint did not justify granting the dismissal motio and called for a reversal by the Court below.

The Court below evidently accepted conformation of th pleadings to the proof that the wrench involved did no have teeth, as stated in the complaint, but was in fact a open end wrench.

The Trial Court's preoccupation with strict compliance of the terminology in the complaint as justification for it dismissal of the suit appears to have been misplaced in th light of the numerous decisions of recent years which hav held that a complaint under the Federal Rules of Civi Procedure need show only the notice of the claim and th theory of law relied upon. The Court's destruction of th cause on so narrow a basis was even more alarming whe coupled with the fact that respondent, with utmost candor freely admitted that it was in no manner surprised by th proof that the wrench jaw had no teeth (90). The tria record had conclusively established that the parties ha full knowledge of the nature of the claim and presented evi dence based upon such knowledge of absence of teeth o the wrench.

The Federal Rules have demanded a liberal attitud with respect to interpretation of phraseology of a complain —consistent with the opportunity of presentation of proo and lack of surprise to the antagonist.

In *Francis* v. *Seas*, 158 F. 2d 584, *supra*, refusing to b bound by the strict tenets of common law pleading, th Court permitted injuries, not pleaded, to be shown, holding

> "* * * the claim was seasonably presented, evidence was introduced in support of it and no surpris

occurred which deprived defendant of a fair trial" (p. 586).

In *Nagler v. Admiral*, 248 F. 2d 319, the Court discussed the concepts of a complaint stating a claim rather than a cause of action under the Federal Rules:

> "But while these essentially nebulous concepts often creep into pleading discussions, they are no part of the rules themselves, but were in fact rejected for more precise formulations. It is well to go back to the rules themselves and their intended purpose. To this end we accept as definitive the precise statement formulated by the Advisory Committee in the light of both purpose and experience to answer criticisms based on some dispute in the interpretation of the rules. This appears in the Report of Proposed Amendment, October 1955, pp. 18, 19, and Preliminary Draft, May 1954, pp. 8, 9, as a note explanatory of F. R. 8(a)(2) and the Committee's decision to recommend the retention of that rule in its present form. The following extracts therefrom are directly pertinent to our present discussion: 'The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement. * * * It is accordingly the opinion of the Advisory Committee that, as it stands, the rule adequately sets forth the characteristics of good pleading, does away with the confusion resulting from the use of "facts" and "cause of action"; and requires the pleader to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.'" (p. 324)

Continental v. Shober, 130 F. 2d 631, an action for fraud, held:

> "[12, 13] Under the Federal Rules of Civil Procedure the function of the complaint is to afford fair

> notice to the adversary of the nature and basis of
> claim asserted and a general indication of the ty
> of litigation involved. Securities and Exchan
> Comm. v. Timetrust, Inc., D. C. N. D. Cal., 28
> Supp. 34, 41; 1 Moore, Federal Practice, 1938, § 8.
> p. 440; Clark, Simplified Pleading, 6 Federal Ru
> Service Law Review No. 57; Commentary, Prop
> Generality of Allegation in Pleading under the F
> eral Rules, 4 Federal Rules Service, Rule 8a.
> Under Rule 8(a)(2) of the Federal Rules a plaint
> 'sets forth a claim for relief' when he makes 'a sh
> and plain statement of the claim showing that t
> pleader is entitled to relief.' See Sierocinski v. E.
> Du Pont de Nemours & Co., 3 Cir., 103 F.2d 8
> Technicalities are no longer of their former impo
> tance, and a short statement which fairly gives not
> of the nature of the claim is a sufficient compliar
> with the requirements of the rules." (p. 635)

The above cited cases are consistent with Rule 15
the Federal Rules of Civil Procedure, which permits fr
amendment of a complaint and conformation of the co
plaint to the proof offered.

Tiller v. *Atlantic*, 323 U. S. 574, discussed the freed
of amendment of a complaint when the defendant—

> "has had notice from the beginning that petition
> was trying to enforce a claim against it because
> the events leading up to the death of the deceas
> in the respondent's yard" (p. 581).

See also: *Hickman* v. *Taylor*, 329 U. S. 495, wherein th
Court clearly enunciated its adherence to the principle
extensive pre-trial preparation rather than strict co
pliance with the language of a complaint; *Lloyd* v. *Unit*
203 F. 2d 789; *Busam* v. *Ford*, 203 F. 2d 469; *Baltim*
v. *O'Neill*, 211 F. 2d 190; *McDowell* v. *Orr*, 146 F. 2d 1
Blair v. *Durham*, 134 F. 2d 729.

The attitude of the Trial Court can best be summ
up as a disbelief of the plaintiff's cause of action. Eve

comment of the Trial Court in its discussion of the motion for a directed verdict points to the fact that the Court was seeking the legal means of destroying the cause.[19]

In determining the matter on the basis of the evidence presented rather than the language of the complaint, the Court below seemingly rejected that narrow interpretation of the complaint by the District Court. In so doing however, the Court of Appeals failed to consider the Trial Court's state of mind in concluding that the suit was faulty because of the lack of evidence in the support of the complaint (98).

Petitioner respectfully submits that either reversal by the Court below of the District Court's exclusion of pivotal evidence and narrow interpretation of the complaint called for a reversal of the directed verdict. As such, the failure of the Court below to so reverse the decision of the Trial Court, was, in itself, reversible error.

[19] The Judge's state of mind may be shown where, reviewing the evidence of causal relation, he stated that petitioner's smoking was probably the cause of the amputation and remarked that there were no amputations in cases of non-smokers, while 15% of smokers required eventual amputation (93). Thus—the Court immediately concluded that petitioner should be in that 15% class rather than 85% non-amputation category, although petitioner had cut down to five and then to two cigarettes per day.

CONCLUSION

Petitioner respectfully prays that this Honorable Court will reverse the ruling of the Court below and remand this matter to said Court for further proceedings in accordance with the facts and law above set forth.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 31

THOMAS MICHALIC,

Petitioner,

vs.

CLEVELAND TANKERS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

Whether in an action for personal injuries under the Jones Act the Courts below were justified in granting (and affirming) defendant's motion for a directed verdict where there was no evidence from which the jury could make a finding of negligence or unseaworthiness as a proximate cause of the injuries sustained?

COUNTER-STATEMENT OF FACTS.

The petitioner, prior to working for the respondent, was a member of the crew of the Steamer William Irwin of the Pittsburgh Steamship Company. During the season of 1951, while on that vessel he dropped a sack of cement on his left foot (the leg involved here) as a result of which

he was hospitalized. During 1952 he was advised by a doctor that he was suffering from the serious circulatory ailment known as Buerger's disease (17, 20). The petitioner was aware of the nature of the disease and its serious implications (20).

At the time of the alleged accident, the date of which the petitioner could not fix, except that it happened in December 1955 (8), he did not report it to the pumpman who was working with him in the pumproom (19). It was not reported to any officer of the Orion until April 1, 1956 (20). The petitioner performed his duties during the lay-up of the vessel in December and left her at the conclusion of the lay-up on January 6, 1956 (70). He rejoined the Orion on March 15th for fit-out and left the vessel and returned to his home in Erie, Pennsylvania, on April 1 (13, 14, 16). He reported to the Marine Doctor in that city. During the early part of April he went into the Detroit Marine Hospital where several amputations on his left leg were performed (17).

The bolts which the petitioner was removing at the time of the alleged accident were on the casing of the centrifugal pump located on the port side of the pump room (105, Respondent's Exhibit C). There were approximately twenty bolts and nuts on the casing or flange and the petitioner had removed all but five or six of them when the wrench allegedly slipped off one of the nuts and dropped on the big toe of his left foot (22, 28, 57).

The petitioner, by his own admission, had no difficulty seeing the nuts at the time he was engaged in removing them (26).

The wrench which the petitioner was using was a 1⅝ inch open-end type, approximately twelve inches long and weighing about 2½ pounds. It was made of a spark

proof alloy and, according to Hans Hansen, the pumpman, who gave it to the petitioner, was in good condition, without any chipped or worn places on it (69). All of the tools in the pump room, consisting of different size wrenches and hammers to do specific jobs, are made of the special non-sparking alloy. They are used only in the pump room and are used only once or twice a year (58, 73, 80). The wrench, which the petitioner used, was examined by the pumpman just prior to the commencement of the work (73).

There is no proof in the record as to the physical properties of the alloys of which the non-sparking wrenches were made. The remarks made by opposing counsel (Br. p. 6) concerning those properties are wholly gratuitous and without any evidentiary support.

The petitioner was a fireman on the Orion. His duties during the navigation season related principally to the firing of the boilers. During the lay-up and fit-out, it is part of a fireman's duties to work on the pumps and valves (61, 62).

Harold Isenbach, who testified on behalf of the petitioner, was Second Mate on the Orion in December 1955 (36). His testimony concerning the condition of the pumproom tools related principally to December 1955 (41). When it became apparent, on cross examination, that he had left the vessel on December 19, 1955, and did not return until the fit-out in March, 1956, his testimony relating to conditions on board the vessel on December 28, 1955, was stricken (47).

The only reference which the Court below made to Isenbach's testimony was the following description of the pumproom tools, as being:

> "* * * in beaten and battered condition * * * they had been very beaten and battered." (108)

At the close of the respondent's case the Trial Court granted the respondent's motion for a directed verdict on the first cause of action on the ground that there was no evidence from which the jury could make a finding of negligence or unseaworthiness (98).

The parties stipulated that the petitioner was entitled to recover the sum of $2,610.00, as maintenance and cure. A judgment dismissing the first cause of action and ordering recovery of the above amount from the respondent was entered on February 27, 1958 (99).

On October 29, 1959, the Court below, in a *per curiam* opinion, affirmed (106-114).

SUMMARY OF ARGUMENT.

This case does not involve a weighing of the evidence to determine whether an issue of fact existed. It presents a situation where there was no evidence upon which the jury could have based a finding of negligence or unseaworthiness.

The District Court properly found, and the Court below properly affirmed, that there was no proof establishing that the wrench was inadequate to perform the function for which it was being used. The description of the wrench as "old, beaten, battered or chewed up" gave no information concerning the condition of either the open end or the grip and the use of these adjectives was not sufficient to permit an inference that it could not be used safely in removing the nuts. The fact that the wrench slipped is not evidence that its slipping was the consequence of some defect in either its jaw or its handle.

There was no proof that the slipping of the wrench was brought about or related to the lighting conditions of the pumproom, or the alleged smallness of the working

area. The petitioner made no claim that the progress of the work was hampered, in any way, by inadequate lighting or cramped quarters. He admitted he had no difficulty seeing the bolts on which he was working and had, in fact, virtually completed the job at the time the accident occurred. The petitioner, himself, removed from the case the issue as to whether a safe place to work had or had not been provided.

The ruling of the District Court, as affirmed by the Court below, was not predicated alone upon a failure to prove the allegations of the complaint. The primary basis of the ruling was the complete lack of proof of a defect which was causally connected with the slipping of the wrench.

Although this Court has ruled that a case must be submitted to the jury if "the proofs justify, with reason, the conclusion that the employer's negligence played any part, even the slightest, in producing the injuries for which damages are sought," it has not abrogated, in any way, the requirement that the evidence must be such that fair-minded men may draw different inferences and that there must be an evidentiary basis to support the jury's verdict. It is still the function of the Trial Court to determine whether that "evidentiary basis" exists.

ARGUMENT.

POINT I.

An examination of this record will reveal that there was no evidence from which the jury could have found that negligence of the respondent or unseaworthiness of the vessel and equipment contributed in any degree, to the slipping of the wrench and its falling on the petitioner's foot.

One of the most cogent arguments in opposition to the petitioner's unsupported conclusion that he had been supplied with a defective wrench, was his own admission that the tool was adequate for the purpose for which it was being used during fifteen-twentieths of the operation involved (22). If, in fact, the wrench did drop, that could have occurred for one of many reasons, none of which would involve the vessel owner, or the vessel, in any way. Perfectly sound tools have been dropped by the users thereof through sheer carelessness and, if any speculating is to be done, that is as reasonable an explanation of this accident as has been advanced.

The opinion of the Court below contains a recital of substantially all of the evidence relating to the conditions in the pumproom, condition of the tools with which the petitioner was working and the circumstances surrounding the accident (108-112). The petitioner described the wrench as "old, beat up, all chewed up on the end." (9, 10). Neither the petitioner, nor any other witness, testified as to any facts from which it could be reasonably inferred that the wrench fell because the handle or grip was inadequate, or that its jaw did not fit the nuts. The terms used in connection with the wrench were descriptive adjectives of a general nature. They are nothing more than an over all description of the tool. They are conclusions unsup-

ported by any facts tending to establish any deficiencies in either the open-end or the handle. By stating that the wrench was defective, the petitioner was invading the province of the jury. When the burden of establishing the defective condition of a tool exists, as it did here, that burden was not discharged by simply saying that it was "defective or kind of beat up." There was no proof that either the open-end or the grip were deficient in any way. The slipping itself is not significant. It could have occurred for any number of reasons unconnected with the condition of the wrench. It should be pointed out that this operation involved the holding of the handle in one hand and striking it a succession of blows with the mallet. Fifteen of the twenty nuts were removed in that fashion. The slipping could have occurred from the failure of the petitioner to put the wrench on the nut properly, the failure to hit the wrench solidly, or the nuts themselves could have been somewhat worn. None of these conditions could give rise to the inference that the wrench was defective.

Counsel for the petitioner has fallen into the same error as the witnesses. He urges that it must follow that the petitioner was referring to the jaw of the wrench when referring to the wrench as "old, beaten, battered and chewed up," and that the jaw failed to grip the nuts because of a defective condition. (Br. p. 25) He does not point out to this Court, nor can he, the existence of any testimony relating to a deficiency in either the handle or the open-end portion of the wrench. He is no more entitled than were the witnesses to conclude that there was a failure to properly grip the nuts, because of a defective condition involving the wrench. The wrench must have gripped the nuts, or fifteen out of the twenty could not have been removed.

It did not rest with the Courts below to guess as to whether the petitioner and his witnesses were referring to one portion of the wrench as distinguished from the other in using the above mentioned descriptive adjectives. In order to make a case, it rested with the petitioner to pin point the fault by proof of facts relating to the jaw of the wrench which made it defective. This he did not do.

There was an early recognition by trial counsel for the petitioner of the obligation to establish specific faults. In the complaint were the following allegations relating to the wrench. (3, 4.)

> "* * * using an old defective wrench in an unseaworthy condition *in that the teeth and grip of the wrench were worn and defective.* * * *"
>
> "* * * when the defendant knew or in the exercise of ordinary care should have known that the *teeth of the wrench would not hold or be secure.*"
>
> "* * * when the defendant knew, or in the exercise of ordinary care should have known *of the condition of the defective teeth of the wrench.*"
>
> "in negligently and carelessly failing and neglecting to provide adequate, proper and seaworthy and reasonably safe appliances, to-wit: *a proper wrench without worn teeth.*" (Emphasis supplied.)

The allegations, above set forth, are somewhat surprising if, as counsel suggests, the absence of teeth in the wrench was known to all (19). These allegations, for obvious reasons, were abandoned upon a showing that the wrench had no teeth, but was open-ended. The petitioner was evidently prepared, initially, to attempt to show that the gripping portion of the wrench, i.e. the teeth, were worn. When the "teeth" were no longer in the case, no effort was made to show that the open-end jaw, (the gripping portion of the wrench) was worn or was defective in any other way. The omission was fatal.

POINT II.

a. The petitioner, himself, removed from the case the issues relating to the alleged lack of proper illumination and lack of room in which to work.

The charges of fault, apart from those relating to the wrench, were directed primarily to lack of illumination and cramped working space. The petitioner, himself, removed the issue of proper light from the case with the following testimony (26):

"Q. You had no difficulty seeing the bolts, did you?

A. No, sir."

The pumproom of a tanker, for obvious reasons, contains catwalks, pumps, pipe lines and valves. There was, however, sufficient room in the vicinity of the port centrifugal pump, where the plaintiff was working, so that lack of space had nothing to do with the dropping of the wrench on his toe. He had nearly completed the job when the wrench dropped and he makes no mention, in his testimony, of being impeded in any way by lack of space or the inability to use the wrench, or the mallet. His description of the progress of the work is as follows (22):

"Q. Now, when you were taking the bolts and nuts off, how many of those nuts had you taken off at the time the wrench slipped?

A. I had them all off but about five or six.

Q. You took those off without difficulty?

A. I had a hard time loosening them off.

Q. But you got them off.

A. Yes.

Q. In other words, you put the wrench on there and tapped it with the mallet and loosened them and you turned the nuts off?

A. I had a hard time taking them off.

Q. But you took them off?

A. Yes, the pumpman told me, 'Do the best you can.'

Q. You got them off and you got all but how many off at the time the accident occurred?

A. About five.

Q. And you were using the same wrench?

A. The same wrench.

Q. And the same mallet?

A. Same mallet all the way through."

The petitioner's criticism was directed at the tightness of the nuts. It is clearly apparent that he had sufficient space within which to use the wrench and the mallet.

The Court below points out that the petitioner's pleadings made no charge of inadequate light or cramped quarters in the pumproom (108). That Court further points out that the petitioner, in his testimony, made no claim that the progress of his work was in any way impaired by inadequate lighting, or cramped quarters (110). Finally, on this point, the Court concluded that there was no testimony in any way supporting a claim that the slipping or dropping of the wrench was brought about by, or related in any way to, the lighting conditions of the pumproom, or the smallness of the area (110).

The question as to whether the work area, in general, was safe was, at no time, an issue in this litigation. The alleged failure to provide a safe place to work must be causally connected with the accident out of which the injuries arose. In connection with the specific alleged failures, (inadequate illumination and cramped quarters) the Court below, contrary to opposing counsel's statement (E p. 26) did not make its own conclusion of fact, but said that there was no testimony supporting the causal relationship (100). It rests with the trial Court to determine the existence or non-existence of supporting proof and there was, we submit, no invasion of the province of the jury.

b. There was no issue of fact as to whether the petitioner was or was not given proper instruction and supervision.

In the complaint filed herein the petitioner did not charge the respondent with a failure to give him proper instruction and supervision (3, 4). Nor is there the slightest suggestion in any of his testimony that he was not given such instruction and supervision as was necessary under the circumstances. The contrary, in fact, is true, for he was shown how to proceed with the job by the pumpman. His testimony in that connection is as follows (10):

"Q. You say that he ordered you to do the work?
A. Yes, he showed me how to remove the head bolts."

* * * * *

"Q. After he showed you did you start to work?
A. Yes, I continued on my pump."

Even if the pumpman had not shown the petitioner how to remove the nuts, the simplicity of the job was such that it did not require instruction or supervision. The petitioner was an experienced seaman. During the fit out and lay-up periods he worked on the boilers, pumps and valves (62). In light of the type of work that he was required to do, it is difficult to believe that he had not been in the pumproom prior to the accident, but, even if this is assumed to be true, it is without significance. The removal of nuts from the bolts on a pump casing does not suddenly become complicated and difficult because the pump happens to be in a strange pumproom. Prior to the accident he had removed fifteen or sixteen nuts, so he must have known how to do the job and the slipping of the wrench, on the seventeenth nut, could not, under any theory, have resulted from lack of instruction or supervision.

c. No jury question was presented as to whether the wrench was reasonably safe and suitable for its purpose.

Before a jury question could arise as to whether the wrench was reasonably safe and suitable for its purpose there must have been proof of the existence of a defect which made it unsafe or unsuitable for the removal of the nuts from the pump casing. We submit that this Court did not say in *Jacobs v. New York*, 315 U. S. 752, that a question of fact is always presented as to whether a tool is reasonably safe and suitable for its purpose. Opposing counsel, by so stating, (Br. p. 17) has, we believe, misconceived the purport of that decision. The District Court, in the case at bar, ruled that the *Jacobs* case was distinguishable, and, therefore, not controlling. (52, 53, 94, 95). That ruling was sound.

In the *Jacobs* case, this Court set forth a detailed summary of the testimony of the petitioner, which it said created a question for determination by the jury. (pp. 753, 754.) Reference was made to testimony that the wrench was "well worn," "had seen a lot of service," "was a loose fit," and "had a lot of play on it." There was also proof that there was "play in the jaws" and that the "play" at the end was "about one inch." (p. 754.) That testimony, as distinguished from the proof in the case at bar, related directly to the suitability of the working portion of the tool. The jaw of that wrench was "well worn" and had a "lot of play on it." There is a marked difference between that type of testimony and the adjectives used by the petitioner here. In the *Jacobs* case the looseness of the jaws and the fact that it was worn could create a reasonable inference that the wrench could not be safely used. The general reference to the wrench involved here as "beaten, battered, old or chewed up" could not possibly give rise to

such an inference. An open-end wrench can even be on the decrepit side and still be a very functional tool, providing the jaw is not worn and is a proper size for the nuts involved. Nowhere in this entire record is the open-end portion of the subject wrench described as worn or loose fitting. In describing the issues which it said should have been submitted to the jury, this Court stated (p. 756):

> "* * * That is to say, it was for the jury to decide whether a monkey wrench was a reasonably safe and suitable tool for petitioner's work, whether respondent's failure, although it had at least two days' and possibly three weeks' notice of the defect, to supply petitioner with a new wrench amounted to negligence on its part, and whether respondent, after it had knowledge of the defect, might not have reasonably foreseen the possibility of resulting harm if it allowed the worn wrench to remain in use. * * *"

The instant case was not only devoid of proof creating an issue as to suitability, but the questions as to the failure to supply a new wrench and the foreseeability of harm were not present, in any form. The *Jacobs* case, decided by this Court on its own facts, is clearly not controlling here.

POINT III.

Under the decisions of this Court the granting of the respondent's motion for a directed verdict was justified.

The Court below, in affirming the action of the District Court, was acutely aware of the import of the recent decisions of this Court relating to the submission of causes to the jury. That Court stated (113, 114):

> "The recent cases of *Rogers v. Missouri Pacific Railway Co.*, 352 U. S. 500, and *Ferguson v. Moore-*

McCormack Lines, 352 U. S. 521, relied upon by appellant, emphasize the jealousy with which today's courts guard the rights of injured workmen to have their causes submitted to a jury where there is any evidence, however slight, to justify a jury's factual finding of liability. The rule that the plaintiff in such a case as this has the obligation to produce some evidence to prove, or permit a justifiable inference of negligence and proximate cause is, however, still a part of our law. It is the function and duty of trial courts to determine whether or not in a particular case there is any evidence to justify the submission of a case to a jury."

There is no language in the *Rogers* case, *supra*, which in any way precludes the Trial Court from making a judicial appraisal of the proofs. That decision does narrow the inquiry to a determination as to "whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death," and, if the appraisal is made and that test is not met, the case should be taken from the jury.

In the *Ferguson* case, *supra*, the Court of Appeals reversed a judgment in favor of the petitioner on the ground that it was "not within the realm of foreseeability" that petitioner would use a knife to chip frozen ice cream (p. 522). This Court concluded that there was sufficient proof of negligence to take the case to the jury because "* * * fair minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him. * * *" (pp. 522, 523). In that case, as in the *Rogers* case, there was some evidence upon which liability could be predicated. Neither decision involved, as does the case at bar, an utter lack of evidence upon which liability could be properly based.

The doctrine of *Schulz v. Pennsylvania*, 350 U. S. 523, does not require a case to be sent to the jury unless there are disputed issues of fact to be determined, or conflicting inferences and conclusions to be resolved. In their absence there is simply no duty for the jury to perform.

The provisions of the Jones Act and the Federal Employers' Liability Act still require that injury sustained by a workman be caused in whole or in part by the employer's negligence and, where unseaworthiness is charged, the defect must be established as a contributory cause of the injury. One Court has suggested that plaintiffs have reached the point where they take the position, that every case, irrespective of the proof submitted, must be submitted to the jury. We do not believe that this Court intends in this type of case, or in any other, that the Trial Court abdicate its prerogative to determine whether a jury question has been presented. In *Kautz v. Delaware, Lackawanna & Western R. Co.*, 129 F. Supp. 777 (D. C. M. D. Penn. 1955) the Court said (p. 779):

> "Plaintiff contends that because of the decisions of the United States Supreme Court in *Lavender, Administrator v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; *Bailey, Administratrix v. Central Vermont Railway, Inc.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Urie v. Thompson, Trustee*, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, and *Stone v. New York, Chicago & St. Louis R. Co.*, 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441, this Court was bound to submit the issue of defendant's negligence to the jury.
>
> "*In support of his position, plaintiff argues that because of these decisions and a few others containing similar language, every case of injury to a railroad employee must be submitted to the jury.*" (Emphasis supplied.)

In further reference to the above cases the Court said (p. 779):

"* * * It is true that in some of those cases there is language used which would tend to diminish the power of a court to exercise its usual judicial control of a verdict where plaintiff's evidence falls below the minimum standard accepted as a basis for the establishment of liability. For example, in *Lavender v. Kurn, supra,* [327 U. S. 645, 66 S. Ct.] 744, it is stated:

> 'It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there was evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.'

"Although this statement seemingly enlarged the function of the jury under the facts of the case, *it requires that the evidence be such 'that fair-minded men may draw different inferences,' and that there be an 'evidentiary basis'* to support the jury's verdict. * * *" (Emphasis supplied.)

There is, we submit, nothing in the decisions of this Court, upon which the petitioner relies which nullifies, in any way, the requirement that the evidence establishing

the negligence of the respondent must be reasonable before an issue for the jury is presented. At two places in this Court's opinion in the *Rogers* case, *supra*, there is reference to the requirement that there must be a "reasonable basis" for the conclusion that negligence exists and that it played some part in the injury or death. That requirement is not satisfied by proof that is not "reasonable" and it rests with the Court and the Court alone to evaluate the proof in that regard. We concede that it is not the function of the Trial Court to weigh conflicting evidence, but it most assuredly has the initial right and obligation to determine whether there is any proof concerning which reasonable minds could or could not disagree. That has been and still is, we believe, the time honored test.

Where there is no proof of negligence, this Court has not hesitated to approve the granting of a motion for judgment notwithstanding the verdict and has ruled that such an action by the Trial Court did not invade the province of the jury. *Moore v. Chesapeake & O. R. Co.*, 340 U. S. 573, 578.

In *Eckenrode, Administratrix v. Pennsylvania Railroad Co.*, 335 U. S. 329, which was a death action under the Federal Employers' Liability Act, this Court said (p. 330):

> "There is a single question presented to us: Was there any evidence in the record upon which the jury could have found negligence on the part of the respondent which contributed, in whole or in part, to Eckenrode's death? Upon consideration of the record, the Court is of the opinion that there is no evidence, nor any inference which reasonably may be drawn from the evidence, when viewed in a light most favorable to the petitioner, which can sustain a recovery for her.
>
> "Accordingly, the judgment is affirmed."

The same question is presented to this Court in the case at bar. The Court, after consideration of this record should, we respectfully urge, reach the same conclusion.

POINT IV.

The testimony stricken by the Trial Court added nothing to the descriptive testimony of the petitioner.

The only portion of the testimony of Harold F. Isenbach which was stricken by the Trial Court related to events which occurred either on December 28, 1955 (date of accident) or thereabouts. The Court's question to the witness and its ruling on the motion to strike were as follows (47):

> "The Court: You told the jury about the things you did, about checking the tools in the pumproom, and those other answers given by you, either as of the date of December 28th when the man says he was hurt or thereabouts. Are you saying now you weren't on that boat after the 19th of December?
>
> "The Witness: Yes, sir.
>
> "Mr. Ray: I move that the witness's testimony be stricken.
>
> "The Court: Ladies and gentlemen, everything this man said about what he had seen on or about that day in his previous testimony, all of which relating to December 28 when this plaintiff was hurt, and the date immediately around there, has to go out. He went off the ship December 19th and knows from his own discharge book he had no business talking about or mentioning it, and no business asking any questions about it if he wasn't there. Go ahead."

The exclusion of the above mentioned portion of Isenbach's testimony was obviously proper. The jury in listening to his testimony concerning conditions which he said existed on or about December 28th, would, of course,

assume that he was speaking from personal knowledge. His absence from the vessel during the indicated period made his testimony hearsay or worse.

The doctrine of the existence of an object at a given time, based upon prior or subsequent existence, to which reference is made by opposing counsel (Br. pp. 38-41), is not applicable here. Isenbach's testimony did not relate to the prior condition of the tools, but to their alleged condition at or near the time of the accident. He did not describe their condition over a five year period, but confined his testimony to December 1955. In that connection he stated (41, 42):

> "Q. And can you describe the condition of those tools in December, 1955?
>
> A. Well, they were in beaten and battered condition, as usual.
>
> Q. Now, did you have an opportunity—wait a minute. When you say they are beaten and battered condition, can you describe them to the jury, please?
>
> A. Well, none of the tools were very, you wouldn't call them new tools but they had been very beaten and battered, perhaps there for some time.
>
> Q. What did the tools consits of?
>
> A. Various wrenches, monkey wrenches and pliers and the wrenches had long iron bars and things of that nature."

Even though Isenbach's testimony had been admissible it would not have strengthened the petitioner's case. It contained general references to all of the tools in the pumproom and the only description given was that they "were beaten and battered."

(p. 578):

"Since there was no evidence of negligence, the court properly sustained the motion for judgment notwithstanding the verdict. * * *" (Emphasis supplied.)

These decisions confirm the doctrine that a defendant in a negligence action is only required to defend against the specific allegations of fault which are asserted against him. Even in this day, when the technical requirements of common law pleadings are not adhered to, the defendant has the right to have the case tried and his responsibility resolved within the framework of the issues as determined by the pleadings.

The Trial Court's attitude or state of mind was not at issue in the Court below, nor is it at issue here. Its granting of the motion for a directed verdict was predicated upon the absence of probative testimony and upon that alone. That action received the unanimous approval of the Court below.

CONCLUSION.

The respondent respectfully submits that the conclusions of the lower Court are correct and free from error and that the judgment should be affirmed.

Respectfully submitted,

LUCIAN Y. RAY,

Counsel for Respondent.

McCREARY, HINSLEA & RAY,

Of Counsel.

SUPREME COURT OF THE UNITED STATES

No. 31.—October Term, 1960.

Thomas Michalic, Petitioner, v. Cleveland Tankers, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[November 7, 1960.]

Mr. Justice Brennan delivered the opinion of the Court.

The petitioner asks damages for personal injuries he allegedly sustained in a shipboard accident while a crew member aboard the respondent's Great Lakes vessel, the tanker, *Orion*. His complaint alleges respondent's liability both for negligence under the Jones Act, 46 U. S. C. § 688, and for unseaworthiness under the general maritime law;[1] a claim for maintenance and cure is also alleged. The parties settled the claim for maintenance and cure at the trial, which was before a jury in the District Court for the Northern District of Ohio. Judgment was entered for the respondent on the unseaworthiness and Jones Act claims upon a verdict directed by the trial judge on the ground of insufficiency of the evidence. The Court of Appeals for the Sixth Circuit affirmed. 271 F. 2d 194. We granted certiorari, 362 U. S. 909.

Michalic claims that in a shipboard accident on December 28, 1955, a two and one-half-pound wrench dropped on his left great toe. Michalic was afflicted with Buerger's

[1] The parties tried the case in the District Court, and argued it here and in the Court of Appeals, as raising issues both of negligence under the Jones Act and unseaworthiness under the general maritime law. We therefore need not be concerned with the confusing language of the complaint and whether it may be read as pleading a claim solely on the theory of negligence.

Disease when he joined the *Orion* three months earlier as a fireman in the engine room. We are informed by the testimony of one of the medical witnesses that Buerger's Disease "is a disease of unknown origin . . . it produces a narrowing of the blood supply going to the foot through the arteries, and it runs a very foreseeable course; it is slowly progressive in most cases and leads to progressive loss of blood supply to the extremities involving usually the legs"; for one afflicted with the disease to drop "a hammer on his toe . . . is a very serious thing and frequently leads to amputation . . . . Because the circulation is already impaired and the wound will not heal properly, and any appreciable trauma will frequently lead to gangrene."

Michalic did not report the accident at the time but continued working until January 6, 1956, a week later, when the vessel was laid up for the winter. Meanwhile he treated the toe every night after work in hot water and Epsom salts. He was at his home from January 6 to March 15 and used hot boric acid soaks "practically every day." He was called back to the *Orion* on March 15. On April 1, 1956, he reported to the *Orion's* captain that "[m]y leg was so bad, so painful, I couldn't take it no more . . . I want a hospital ticket." The Captain gave him the ticket after filling out a report in which he stated that Michalic told him that on December 28, 1955, "While working with pumpman in pumproom man said he dropped a wrench on his foot and his toe has been sore ever since." This was the first notice respondent had of any accident.

At the hospital in April, a diagnosis was made of "an infected left great toenail and gangrene of the left great toe secondary to the Buerger's Disease." During the spring three amputations were performed on the left leg, first the great left toe, next the left leg below the knee and

then part of the leg above the knee. Medical experts, three on behalf of the petitioner and one for the respondent, differed whether, assuming that the wrench dropped on Michalic's left great toe on December 28, there was a causal connection between that trauma and the amputations. This plainly presented a question for the jury's determination. *Sentilles* v. *Inter-Caribbean Corp.*, 361 U. S. 107, and we do not understand that the respondent contends otherwise.

The basic dispute between the parties is as to the sufficiency of the proofs to justify the jury's finding with reason that respondent furnished Michalic with a wrench which was not reasonably fit for its intended use. Here a distinction should be noticed between the unseaworthiness and Jones Act claims in this regard. The vessel's duty to furnish seamen with tools reasonably fit for their intended use is absolute. *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96; *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *The Osceola*, 189 U. S. 158; *Cox* v. *Esso Shipping Co.*, 247 F. 2d 629; and this duty is completely independent of the owner's duty under the Jones Act to exercise reasonable care. *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539. The differences are stated in *Cox* v. *Esso Shipping Co.*, *supra*:

> "One is an absolute duty, the other is due care. Where . . . the ultimate issue . . . [is] seaworthiness of the gear . . . . The owner has an absolute duty to furnish reasonably suitable appliances. If he does not, then no amount of due care or prudence excuses him, whether he knew, or could have known, of its deficiency at the outset or after use. In contrast, under the negligence concept, there is only a duty to use due care, i. e., reasonable prudence to select and keep in order reasonably suitable appliances. Defects which would not have been known

to a reasonably prudent person at the outset, or arose after use and which a reasonably prudent person ought not to have discovered would impose no liability." 247 F. 2d, at 637.

Thus the question under Michalic's unseaworthiness claim is the single one as to the sufficiency of the proofs to raise a jury question whether the wrench furnished Michalic was a reasonably suitable appliance for the task he was assigned. To support the Jones Act claim, however, the evidence must also be sufficient to raise a jury question whether the respondent failed to exercise due care in furnishing a wrench which was not a reasonably suitable appliance.

The wrench dropped on Michalic's foot while he was using it to unscrew nuts from bolts on the casing of a centrifugal pump in the pumproom. He had been assigned this task by the pumpman after the first assistant engineer sent him from the engine room to the pumproom to help ready the pumps for the vessel's winter lay-up. There were about twenty-five 1⅝" nuts tightly secured to the bolts on the casing. The pumpman gave him a 1⅝" straight end wrench weighing two and one-half pounds and ten to eleven inches long, and also a mallet. The pump was located alongside and some inches below a catwalk and Michalic had to step down from the catwalk to reach the casing. His task required the gripping of each nut in the claw of the wrench and the hammering of the side of the wrench with the mallet to apply pressure to loosen it. Michalic had removed all but a few of the nuts when he "had hold of a nut" with the wrench and "I hit it [the wrench] with the mallet and it slipped off the nut and came down the side of the pump and hit my big toe. . . . Yes, she slipped off the nut on the pump and came down the side of the pump and smashed my big toe."

Michalic contends that the proofs were sufficient to justify the jury in finding with reason that there was play

in the claw of the wrench which prevented a tight grip on the nut, thus entitling him to the jury's determination of his unseaworthiness claim; and were [redacted] sufficient to justify the jury in finding with reason that the respondent negligently furnished him with a defective wrench, thus entitling him also to the jury's determination of his Jones Act claim.[2] The evidence viewed in a light favorable to him was as follows: The wrench and other pumproom tools were kept in the pumproom tool box and were used only when the vessel was being prepared for lay-up. The tools were four or five years old. Because of the danger of fire, the tools, including the wrench and mallet which Michalic used, were made of a special spark-proof alloy. The second mate, who had left the *Orion* on December 19, testified that the tools were bronze because "Bronze tools are for non-striking." It was the practice to inspect the pumproom tools and replace worn ones before their use at lay-up time but the first assistant engineer who testified to the practice did not say this inspection was made in 1955; and the pumpman testified that "It could be" that no one looked at the tool box for nine months before December 28. The second mate testified that the tools "had been very beaten and battered, perhaps there for some time." Michalic testified that he noticed when the pumpman gave him the wrench that it was an "old beat-up wrench . . . all chewed up on the end." Michalic said that when he started work "the wrench was slipping off the nuts; it slipped off every one of them." He "had

[2] The trial judge ordered the second mate's testimony to be stricken from the record when it appeared that the mate left the *Orion* on December 19. The Court of Appeals nevertheless considered the testimony so far as it concerned the condition of the tools. 271 F. 2d, p. 196. We think the action of the Court of Appeals was correct in light of the testimony of respondent's own witnesses, from which it is reasonable to infer that the tools used on December 28 had been in the toolbox for some time prior to December 19.

a hard time loosening them off." He protested to the pumpman that "This wrench keeps slipping off" and the pumpman answered "Never mind about that, do the job as best you can."

The trial judge found the evidence to be insufficient to present a jury question whether the wrench was a reasonably suitable appliance, because "on the theory the grip is worn . . . there is never any mention of the grip in the case . . . ." The Court of Appeals took the same view, saying "There was no evidence that the open or jaw end of the wrench was in any way deficient . . . [t]he fact that the wrench slipped is not evidence that its slipping was the consequence of some condition in the jaw or handle of the wrench." 271 F. 2d, p. 199. We think that both lower courts erred. True, there was no direct evidence of play in the jaw of the wrench, as in *Jacob* v. *New York City*, 315 U. S. 752, 754. But direct evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 508, n. 17.[3] The jury, on this record, with the inferences permissible from the respondent's own testimony that inspections were necessary to replace tools of this special alloy because of wear which impaired their effectiveness, could reasonably have found that the wrench repeatedly slipped from the nuts because the jaw of the wrench did not properly grip them. Plainly the jury,

[3] The trial judge rested his action partly on a supposed variance between the complaint and the proof at the trial. The complaint alleged that the wrench was "an old defective wrench in an unseaworthy condition in that the *teeth* and grip of the wrench were worn and defective." (Emphasis supplied.) Michalic and all the witnesses at the trial who testified about the wrench described its claw as smooth faced and without teeth. We see no fatal variance and in any event respondent waived reliance on any by expressly disclaiming surprise at the trial.

with reason, could infer that the colloquy between Michalic and the pumpman, and Michalic's testimony as to slipping, related to the function of the jaw of the wrench in gripping the nuts and that there was play in it which caused the wrench to slip off. Thus the proofs sufficed to raise questions for the jury's determination of both the unseaworthiness and Jones Act claims. "It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes . . . ." *Rogers* v. *Missouri Pacific R. Co.*, *supra*, p. 506.[4]

The Jones Act claim is double-barreled. Michalic adds a charge of negligent failure to provide him with a safe place to work to the charge of negligence in furnishing him with a defective wrench. However, the case was not tried, nor is it argued here, on the basis that the charge of negligence in failing to provide a safe place to work rests solely on evidence tending to show a cramped and poorly lighted working space, regardless of the suitability of the wrench. On the contrary, Michalic also makes the allegedly defective wrench the basis of this charge, arguing in effect that the described conditions under which he was required to do the work increased the hazard from the use of the defective wrench. Under that theory, the relevance of the testimony is only to the charge of furnishing a defective

[4] The petitioner does not invoke the District Court's jurisdiction on grounds of diversity of citizenship. Thus, there is jurisdiction on the law side of the court of the unseaworthiness claim only as "pendent" to jurisdiction under the Jones Act. *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 380–381. However, the question expressly reserved in *Romero*, p. 381—whether the District Court may submit the "pendent" claim to the jury—is not presented by the case. The *Orion* was a Great Lakes vessel and the petitioner is entitled to a jury trial of his unseaworthiness claim under 28 U. S. C. § 1873. See *Troupe* v. *Chicago, D. & G. Bay Transit Co.*, 234 F. 2d 253; *The Western States*, 159 F. 354; *Jenkins* v. *Roderick*, 150 F. Supp. 299.

wrench and the causal connection between that act and his injury. Phrasing the claim as a failure to provide a safe place to work therefore adds nothing to Michalic's case, and he was not entitled to have that claim submitted to the jury as an additional ground of the respondent's alleged liability.

The judgment of the Court of Appeals is reversed and the cause remanded to the District Court for a new trial.

It is so ordered.

For the reasons set forth in his opinion in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524, MR. JUSTICE FRANKFURTER is of the view that the writ of certiorari was improvidently granted.

SUPREME COURT OF THE UNITED STATES

No. 31.—October Term, 1960.

Thomas Michalic, Petitioner, v. Cleveland Tankers, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[November 7, 1960.]

Mr. Justice Harlan, with whom Mr. Justice Whittaker and Mr. Justice Stewart join, dissenting.

At the opening of a Term which finds the Court's docket crowded with more important and difficult litigation than in many years, it is not without irony that we should be witnessing among the first matters to be heard a routine negligence (and unseaworthiness)[1] case involving only issues of fact. I continue to believe that such cases, distressing and important as they are for unsuccessful plaintiffs, do not belong in this Court. See dissenting opinions in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, at 524, 559.

The District Court, finding that the evidence presented no questions for the jury, directed a verdict for the respondent. The Court of Appeals, in an opinion which manifests a conscientious effort to follow the precepts of the *Rogers* case, unanimously affirmed, after a painstaking assessment of the record. 271 F. 2d 194. My own examination of the record and of the opinion of the Court of Appeals convinces me that there is no warrant for this Court overriding the views of the two lower courts.

The core of petitioner's case was the condition of the wrench, his unsafe-place-to-work theory having evaporated in thin air, as the Court recognizes. Having had to abandon his original theory that the claw of the wrench

[1] See note 1 of the Court's opinion, *ante*, p. —.

had defective teeth (since the wrench was toothless), petitioner testified (1) that the instrument "was an old beat up wrench . . . all chewed up on the end" (whether at the claw or handle does not appear); and (2) that the wrench had slipped off nuts at various times during the operation (albeit petitioner had before the accident successfully removed some 15 out of 20 nuts without mishap).

While the Court, in stating that "there was no direct evidence of play in the jaw of the wrench," seems to recognize that this testimony did not suffice to show any actionable flaw in the wrench, it nonetheless concludes that the jury should have been permitted to infer one in light of two other factors. These are (1) the second mate's testimony that as of some 10 days before the accident,[2] the tools in the pumproom tool box "had been very beaten and battered" (whether at the claw or handle, or anywhere else, does not appear); and (2) other evidence which, as I read its opinion, the Court takes as establishing that the tools were old and infrequently inspected. (Actually the record shows that the tools had been used only four

[2] The exact date of the accident is obscure. Petitioner did not report the alleged accident for some six months after he claimed it occurred. The then master testified with respect to the filling out of the company accident form:

"Q. How did you arrive at the date of December 28, 1955.

"A. Well, it was merely an arbitrary date. It was kind of hard to reckon back at the time this [the form] was made up. This was made up on the 1st of April following. This may have been any time in December. It may have been the 21st, it may have been any time during that period. . . .

"The COURT: That is the date plaintiff gave. Were you on the vessel on that day, December 28?

"The WITNESS: Not to my recollection, sir, but when we typed this up Mr. Michalic, the plaintiff, gave me that as the approximate date. He didn't really know exactly when it would have been."

or five times and that the wrench had been inspected just before it was handed to petitioner.[3]

Judged by any reasonable standard this evidence, fragmentized or synthesized as one may please, did not in my opinion make a case for the jury. The additional factors on which the Court relies add nothing to the inherent deficiencies of petitioner's testimony which the Court seems to recognize did not of itself make out a case of either negligence or unseaworthiness. If it is permissible for a jury to rationalize "into being" a defective wrench from this sort of evidence, then wrenches have indeed become dangerous weapons for those operating vessels on the Great Lakes. If the rule of *Rogers* means that in FELA cases[4] trial courts are deprived of all significant control over jury verdicts, and juries are in effect to be allowed to roam at large, I think the lower federal courts should be so told. See *Harris* v. *Pennsylvania R. Co.*, 361 U. S. 15, 25 (dissenting opinion). At least this would be better than continuing to require the lower courts to operate in what must be an atmosphere of increasing bewilderment over what is expected of them in these federal negligence cases.

I would affirm.

[3] The pumpman, whom petitioner was helping, testified that the wrench used by petitioner was one of three that had been procured four or five years before; that they were used only once a year; and that he had inspected the wrenches just before taking them out of the tool chest on the day in question.

[4] The Jones Act, here involved, incorporates the standards of the Federal Employers' Liability Act.